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# Supreme Court of the United States

**No. 167.**

THOMAS WARDELL, APPELLANT,

*vs.*

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

BRIEF FOR THE APPELLANT.

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*vs.*

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

## BRIEF FOR THE APPELLANT.

This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska.

It was a bill in equity, filed by the appellant against the Union Pacific Railroad Company, the Wyoming Coal and Mining Company, John Duff, Oliver Ames, Sidney Dillon, Cornelius S. Bushnell, Thomas C. Durant, James W. Davis and Andrew J. Poppleton.

On the 16th day of July, 1868, the plaintiff and Cyrus O. Godfrey, of the one part, and the Railroad Company of the other part, entered into an agreement of which the following is a copy:

**This Agreement,** Made this 16th day of July in the year of our Lord one thousand eight hundred and sixty-eight, between the Union Pacific Railway, by its proper officers, of the first part, and Cyrus O. Godfrey and Thomas Wardell, of the State of Missouri, or assigns, parties of the second part:

WITNESSETH, That the said party of the first part agrees that the said parties of the second part may prospect at their own expense for coal on the whole line of the Union Pacific Railway and its branches and extensions, and open and operate any mines discovered, at their own expense; that the said railroad company agrees to purchase of said parties of the second part all clean merchantable coal mined along its road needful for engines, depots, shops and other purposes of the company, and to pay for the same the first two years at the rate of six dollars per ton, for the next three years at five dollars per ton, for the four years thereafter at four dollars per ton, and for the six years remaining at the rate of three dollars per ton, delivered upon the cars at the mines of the said party of the second part, and which shall not be less than ten per cent. added to the cost of the same to the said party of the second part. This contract to be and remain in full force and effect for the full term of fifteen years from the date hereof.

The said railroad company agrees to facilitate the operations of the said parties of the second part, in prospecting and otherwise, by means of such information as it may possess, and by furnishing free passes on the road to the agents of the parties of the second part, not exceeding six in number. Said railroad company further agrees to put in switches and the necessary side-

tracks at such points as may be mutually agreed upon for the accommodation of the business of the said parties of the second part; that the said parties of the second part agree to make all necessary exertions to increase the demand and consumption of coal by outside parties along the line of said railroad, and to open and operate mines at such points where coal may be discovered, as may be desired by said railroad company; and to expend within the first five years from the date of this agreement in the purchase and development of mines and mining lands and improvements for the opening, successful and economical working of the same, not less than the sum of twenty thousand dollars; also to furnish for the use of said railroad company good merchantable coal, and to pay all expenses for improvements for loading coal into cars. Any improvement desired by said railroad company in regard to the coal to be used by it shall be at the cost of said railroad company.

In consideration of their exertions to increase the demand for coal, and the large sum to be expended in improvements, it is further agreed that the party of the second part shall have the right to transport over the said railroad and its branches for the next fifteen years from the date of this agreement, coal for general consumption at the same freight that will be charged to others; but the said party of the second part shall be entitled in consideration of services to be rendered as herein provided, to a draw-back of twenty-five per cent. on all sums charged for the transportation of coal.

The said railroad company agrees to furnish the party of the second part such cars as may require in the operation of their business, and to transport them as

promptly as possible. This agreement to remain in force for fifteen years.

The coal lands owned by said party of the first part are hereby leased for the full term of fifteen years to the said party of the second part or their assigns, for the purpose of working the same as may seem to them profitable; said party of the second part to pay for the first nine years a royalty of twenty-five cents per ton for each ton of coal taken from their lands, excepting always coal taken from entries, air-courses or passage-ways, for which coal no royalty shall be paid; payments for the same being due and payable monthly.

The royalty for the last six years of this lease shall be free, provided the price of coal to the railway company is reduced to three dollars per ton. If three dollars and twenty-five cents or more per ton, then in that case the royalty shall be as during the first nine years.

In witness whereof we have hereunto set our hands and seals this the day and year first above mentioned.

(Signed) *Oliver Ames*,
President of the Union Pacific R.R. Co.
*C. O. Godfrey.*
*Thomas Wardell.*

The Railroad Company assails the validity of this contract, alleging that its officers and directors entered into it with the agreement between them and Wardell and Godfrey, that they should share in the profits arising out of its execution. This is the first and main question in the case.

Wardell and Godfrey entered at once upon the execution of the contract. In September, Godfrey, being unable to furnish his proportion of the very large sums required to be expended in its execution, and becoming alarmed at the risks involved, for $10,000, sold his interest to Wardell, who continued the prosecution of the business.

In November, articles were drawn for the incorporation of the Wyoming Coal and Mining Company. These articles were not pursued. But in January, 1869, others, differing from the former in slight particulars, were drafted and recorded. In December, a subscription to the stock was signed, at Omaha, by the defendants, Durant, Dillon and Ames, and by the plaintiff, each taking 500 shares of stock—it being understood at the time that Duff would take 500 shares, and Bushnell some part thereof, but how many was not decided. This paper was taken by Durant, and was never in the possession of the Coal Company. At the filing of the bill, it had been signed by Duff for 500 shares, by Bushnell for 250 shares, by C. A. Lambard for 500 shares, and by J. W. Davis for 10 shares. In February, the record of a meeting of stockholders of the Company was made, showing that Durant, Ames, Dillon and Wardell were present by proxy, representing each 500 shares of stock, when Duff, Ames, Bush-

nell, Wardell and Davis were elected directors. In May, the directors met and elected Duff, President, Bushnell, Vice-President, and Wardell, Secretary and Treasurer.

At this meeting, resolutions were passed: among them one accepting the contract already mentioned; another appointing a committee to apportion nine-tenths of the stock among the stockholders of the Railroad Company, provided they took it within thirty days after notice; and another, levying two assessments of ten per cent. each, one to cover the amount advanced by stockholders, and one to cover the present liabilities of the Company. A set of by-laws were also adopted. From that time to December, 1872, no directors' meeting was held. The plaintiff, in his capacity of Secretary, Treasurer and General Manager, conducted the business, reporting monthly to Mr. Duff at Boston.

None of the assessments upon the stock were paid, except in this way:

Shortly after the contract was made, Wardell, Godfrey and one Watson, paid in five per cent. on $65,000. The contractors for building the railroad also advanced $21,750, which was credited to stock; some $12,000 also came to Wardell's hands, which, by Mr. Durant's direction, was credited to the same ac-

count, and $30,000 was paid by or through Durant, and was also credited to the same account.

The Railroad Company claims that if the contract was valid, the subscriptions to the stock were in trust for it, excepting that of the plaintiff.

On the 13th of December, 1872, a meeting of the directors of the two companies was held in New York, when their affairs and relations and the contract were extensively discussed. Duff, Ames, Dillon and Bushnell admitted, at this time, that their subscriptions to the stock of the Coal Company were in trust for the Railroad Company. A meeting of the directors of the Coal Company was then held, at which a series of preambles and resolutions were adopted, reciting the making of the contract, its assignment to the Coal Company, the intention at the time that its stock should be represented by the contract, and that shares representing the capital stock were to be issued to Wardell and Godfrey as full paid stock, and that Godfrey had assigned his interest in the contract and the stock to Wardell, and resolving that 5,000 shares should be issued to Wardell, as full satisfaction of the consideration of the assignment, it being understood that he should immediately assign to the Railroad Company 4,500 of said shares.

At the same time, a resolution was passed abro-

gating and annulling the clause in the contract providing for a drawback on freight, and also another, electing Mr. Poppleton a director in place of Mr. Davis.

Mr. Wardell refusing to assign the 4,500 to the Railroad Company, on the 16th of the same month, another meeting of the directors of the Coal Company was held in New York. Mr. Wardell withdrew from this meeting, when a resolution was passed rescinding that of the former meeting, and directing the issue of 500 shares to him, and 4,500 to Mr. Bushnell, upon the same understanding.

In their depositions, Mr. Ames says he never was a stockholder in the Coal Company; Mr. Duff that he never had any interest in it, except as stockholder of the Railroad Company, and Mr. Dillon, that he had no design of having an interest in the contract, or any design about it. Mr. Davis has assigned his interest to the Railroad Company. Mr. Lambard had no connection with the matter in any way, except that, at some time before the filing of the bill, he signed the subscription paper.

Upon these facts, the question arises, who are the real owners of the property and stock of the Coal Company.

From December, 1872, the plaintiff earnestly

urged a settlement of the differences between the companies. The debt of the Railroad Company to the Coal Company had become $1,300,000, and its property $450,000. In March, 1874, he being in Boston, negotiating a settlement of these matters, an order was, without his knowledge, sent from there to the administrative officers on the line of the road, to seize all the property of the Coal Company, and appropriate it to the use of the Railroad Company. This was at once done; the office, books, records, papers, mining stores, machinery, and business of the Coal Company being taken by the Railroad Company; the latter thereupon commenced, and has ever since carried on the business, in its own name, entirely disregarding the existence of the Coal Company.

Mr. Poppleton having resigned his position as director, at a meeting in Boston, on the 20th of September, 1875, F. M. Ames was elected in his place. On the 29th of the same month, at Boston, F. M. Ames was elected Secretary and Treasurer. At the same time, a settlement was made between the two companies of all past and future claims; the Railroad Company paying the Coal Company $1,000,000—and a resolution being passed that nine-tenths of this sum be paid to the Railroad Company and one-tenth to Wardell. On the 30th of December, at a meeting in Boston, at which

Oliver Ames, F. M. Ames and C. S. Bushnell were present, a resolution was passed that 4,500 shares of stock be issued to Mr. Bushnell, to be by him assigned to Mr. Dillon as trustee of the Railroad Company, and 500 to Wardell.

The stock was issued accordingly. In February, 1876, upon a notice given by F. M. Ames as secretary, a meeting was held at Omaha, when Oliver Ames, F. M. Ames, Jay Gould and F. Gordon Dexter, all directors in the Railroad Company, were elected directors of the Coal Company. Afterwards Gould was elected President, Dexter Vice-President, and F. M. Ames, Secretary and Treasurer. The plaintiff had no part in these proceedings, never received the 500 shares of stock nor the $100,000 part of the $1,000,000 pretended to have been paid by the Railroad Company to the Coal Company, although both the shares and the pretended dividend were tendered to him.

The prayer of the bill is that the rights and interests of the parties be ascertained and declared, that the proceedings at the meetings of December 13th and 16th, 1872, be declared void; that accounts be taken of the several matters involved; that the Railroad Company, and Dillon, Duff, Bushnell and Oliver Ames be decreed to pay the several sums which shall be found to be due

from the Railroad Company, for injunctions and a receiver.

General answers to the bill were filed by the Railroad Company, the Coal Company, Dillon, Bushnell, Oliver Ames and Durant, and disclaimers, were filed by Davis and Poppleton. The bill was taken as confessed against Duff. Others were named in the bill as defendants, but were not served with process and did not appear. Mr. Lambard, one of these persons, had died when the bill was filed.

The cause was heard upon pleadings and proofs, and a decree rendered in favor of the plaintiff for $100,000; and he appealed to this court. The Railroad Company prayed an appeal, and filed its supersedeas bond, but has not docketed its appeal.

## FIRST POINT.

The contract above set out was made between the parties thereto, without any understanding that any of the officers or directors of the Railroad Company should be interested therein, or in any way share the profits arising from its execution, or derive any personal advantage from it.

The charges against the contract are in the Railroad Company's answer, at page 26 of the record.

They are, briefly stated, that:

1. Messrs. Duff, Dillon, Durant, Oliver Ames, Bushnell and Lambard were controlling directors of the Railroad Company, and with Oakes Ames exercised unlimited control over its affairs.

2. They knew that coal existed in inexhaustible quantities, of suitable quality for railroad purposes, and at points along and over the line, and that its production was easy and convenient.

3. Durant and his associates conceived the plan of organizing a corporation for the purpose of mining the coal, and selling it to the Company and others, in which corporation they should be the principal stockholders, and of using their position in the Company to make a contract between it and such proposed corporation, to supply it with coal for a long period, at exorbitant prices, so as to absorb and extract the earnings of the Railroad Company, and cause them to inure to their individual benefit.

4. Durant set on foot inquiries for a party suitable to carry out these purposes, and possessed of the requisite practical experience to carry out the scheme, and take actual charge of the operations of the proposed corporation; and in such search found Wardell and Godfrey.

5. The subject of the contract was first broached

by Durant, or some of the said directors or agents of the Railroad Company, to Wardell or Godfrey, or both of them.

6. Its terms were dictated and it was drawn up by Durant or some of his associates.

7. It was made and delivered upon the explicit and full understanding between Durant and his associates, on the one hand, and Wardell and Godfrey on the other, that it should be assigned by them, without consideration, to a corporation to be organized for the said purpose, of which Durant and his associates should be the principal stockholders, and which should execute the contract.

8. Wardell carried out this purpose by procuring the corporation to be organized, personally superintending the draftiug of the articles and by-laws thereof, under the direction of Durant and his associates.

9. He entered into the contract, well knowing the objects and purposes of Durant and his associates, and with the intention of furthering them by his actual agency.

10. And this he did, in every way and by every device in his power, until Durant and his associates, becoming alarmed at the opposition developed to the contract, disavowed all personal interest in it.

11. To the allegation of the bill in its third paragraph, that Godfrey agreed with Duff, Dillon, Bushnell, Durant and Ames, that they should have nine-tenths interest in the contract, Godfrey and Wardell retaining only one-tenth, and that Duff, Dillon, Bushnell, Durant and Ames should furnish all the money necessary for the enterprise, and that Wardell ignorantly acquiesced therein, the Railroad Company answers, denying these allegations, and insisting that such agreement preceded the contract, and was with the additional stipulations above set forth.

I. Before entering upon the examination of the testimony upon this point, it is proper to advert to the nature and amount of the proof by which these charges must be sustained.

To those officers of the Company, Messrs. Oliver Ames, Duff, Durant, Dillon, Bushnell and Lambard, these charges impute deep moral turpitude. The penal law denounces severe sanctions against their alleged acts; if they are guilty, good men will deny them a decent respect. And, besides, we have here, as will be shown directly, the positive denial under oath of every one of them.

The presumption is always in favor of innocence and not of guilt. Fraud is not to be assumed from doubtful evidence. Circumstances of suspicion only

will not warrant the conclusion of fraud. These principles are elementary.

Their application may be illustrated by two or three cases:

*Philliplace v. Sayles, 4 Mason 312*, was a suit in equity by a judgment-creditor, to set aside a release and composition discharging the debt, and to reach a farm conveyed by the insolvent to his son, on the ground that the deed was made to defraud creditors. After stating that the answers allege that the consideration for the deed was paid and was responsive to the bill, at page 319, Judge Story says:

"This, then, being the posture of the case, it is necessary to consider whether the circumstances relied on as presumtive of fraud, are of such a nature as ought to outweigh the positive denials of the answers. It is not sufficient for the plaintiff to show circumstances of doubt or suspicion, or even of inflamed suspicion or doubt. Nor is it sufficient to establish contradictions in the testimony of either party, which might induce the court to pause or hesitate, as to the side on which the truth lies. He must go farther, and establish beyond a reasonable doubt, that the weight of evidence and circumstances is so decisively in his favor, as to destroy the ordinary credit of the answers."

There, as here, were denials of the fraud. Now,

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the rule, irrespective of the effect to be attributed to sworn denials of the alleged fraud, is applied in one or two other cases to which we will refer.

*Brown v. Evarts, 2 H. of L. Cases, 257*, was a bill by the remainder man to set aside a judicial sale made in a creditor's suit for administration of an estate. Sir Edward Sugden, as Lord Chancellor of Ireland, held that the plaintiff was not entitled to impeach the sale and dismissed the bill; and on appeal to the House of Lords, the Lord Chancellor Cottenham said, at page 28:

"It is true that if a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been affected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial therefore whether such machinery and contrivances consist of a decree of a court of equity and a purchase under it, or of a judgement at law, or of other transactions between actors in the fraud. But in proportion as this jurisdiction is powerful and operative, so ought the care and caution of the court to be anxiously exercised, as to the grounds upon which it proceeds, lest in the zeal to do equity, the reverse be effected."

*Hamilton v. Kirwan, 2 Jo. & L. 393*, was a bill to

impeach a mortgage, on the ground that it arose out of an improper agreement between a father and his son who was under his influence. The circumstances of suspicion were so great that Sir Edward Sugden refused costs against the plaintiff, in dismissing the bill; but they were not so decisive as to satisfy the mind of the great Chancellor.

These illustrations are sufficient to enforce the rules by which cases like this are to be tested. They make apparent the necessity, resting on the Railroad Company, to satisfy the court, not that there is room for doubt or suspicion, even inflamed suspicion; but that there is no room for doubt, and that there is certainty that these men, Ames and Duff and Durant and Dillon and Bushnell and Lambard, were guilty of a gross breach of the trust, which had been reposed in them.

II. Reserving for a space the consideration of the ultimate question whether these directors of the Company are guilty of the crimes charged against them, by entering into any sort of corrupt agreement with Godfrey and Wardell, I desire first to show that the proof, on one side as well as the other, utterly fails to establish the charges in the circumstances as alleged in the answer and above set out are:

These charges throw the odium of this tran-

saction upon Mr. Durant and put him forward as its contriver and parent. This is of a piece with the effort throughout the defense to arouse suspicions on account of the alliance of the parties with the Credit Mobilier scandals, in which his name has been involved. But the proof is he had nothing to do with the making of this contract; he knew nothing of it until it was executed. At page 142 of the record he says he never saw Godfrey but once, and that was on the 16th of July, 1869, and then first saw Wardell; he then saw the contract executed and did not before know that it was in contemplation and never heard the names of Godfrey or Wardell until shown the contract as drawn.

Godfrey, himself, the main witness for the defendant, says, at page 236, that he negotiated the contract with Mr. Duff, and only says he thinks he saw Mr. Durant, but had no conversation with him.

Again: instead of being sought out by Durant or anybody else interested in the Company, Godfrey, at page 235, and Wardell, at page 105, show that they, with no acquaintance with any one connected with the Railroad, sought this contract, proposed its terms to Mr. Duff, and drew it up.

Further: the scheme of a corporation in whose name the contract should be executed was the plan of

Godfrey and Wardell, which did not take form until long after the contract was made.

This appears not only from the plaintiff's testimony, but that of Godfrey also. He says the terms of the contract were agreed to on the 15th; and not until the 16th, the day on which it was executed—whether before or after its execution does not appear--Mr. Duff and Mr. Bushnell asked Godfrey how they proposed to operate; when he answered "By a joint stock company;" and he showed them blanks which he and Wardell used in other coal companies which they had managed in Missouri.

Nor of the existence of coal fit for use, had any definite knowledge come to the directors. Mr. Durant says, at page 150, that prospectors had been sent out, and reported coal, but their reports, on examination, proved extravagant; and at several points at which deposits were reported none was found. He says, "all this so-called coal was a variety of lignite, that crumbled on exposure to the atmosphere, and subject to spontaneous combustion. We sent an experienced miner with men to several points on the line, and it was exceedingly questionable whether any of the so-called coal could be used to advantage for the purpose of the road, except at two or three points. * * From all the information I had, I was not satisfied that coal did exist of the

kind we wanted, at the points reported upon; and I was fully aware that many of the reports were made from hearsay—from the general talk of men who were not familiar with coal," etc., etc. Nor is there any proof to the contrary.

It then appears that the charges in the answer in their circumstances are disproved—the charge that this was the conception of Durant, that he sought out Wardell and Godfrey, that he or any one connected with the Company drew up or dictated the terms of the contract, that he or any of his associates proposed that a corporation be formed to execute the contract, and that the directors knew that coal existed on the line, of good character and in large or any quantities fit for use.

And in cases like this the fraud must be charged in its circumstances and be proved as charged.

*Glascott v. Lang, 2 Phillips, 310;*
*Hallows v. Furnie, L. R. 3 Ch. 467;*
*Price v. Berrington, 3 McN. & G. 486;*
*Macguire v. O'Risley, 3 Jo. & L. 224;*
*Wilde v. Gibson, 1 H. L. Cases, 605.*

3. Pass now from this brief review of the testimoney bearing on these circumstances, to the question whether before the making of the contract there was

any agreement that the officers and directors of the Company should be interested in the profits arising from its operation.

This is unqualifiedly denied by Mr. Ames who is called by the Company and in answer to the 5th interrogatory at page 193, "Whether or not to your knowledge was there any agreement or understanding between any officer, director or agent of the Railroad Company and said Wardell and Godfrey, or either of them, by which any director, officer or agent of the Railroad Company was to share in the pecuniary benefits of said contract, either directly or indirectly, or by the organization of a corporation in which such directors, officers or agents or any of them were to become stockholders. If yea, state fully and in detail the substance and history of such arrangement?" he says:

"I don't know of any such contract, arrangement or understanding. I had no such agreement or understanding; but as I did not make the contract I knew nothing about any agreement."

And he repeats the same on page 196.

Mr. Dillon, the President of the Company, answers the same questions in the same way; he says at page 233, "I have no personal knowledge of any such agreement."

Mr. Duff, in answer to a similar question, says at page 167, "I had no such understanding with either Godfrey or Wardell;" and again in answer to the 8th interrogatory, he says, "Neither I nor any of the other directors of said Railroad Company to my knowledge had or have any interest in said contract, or any right or promise to share in Wardell's and Godfrey's profits, except such interest as we may have by reason of being stockholders in said Railroad Company."

Mr. Durant says at page 145, "No promise express or implied was ever made to me, and I never heard of any promise directly or indirectly before the contract was made by Godfrey and Wardell, or either of them to give any director of the Union Pacific Railroad Company any interest in the contract or the profits arising from it or any benefit to be derived from it." At page 154, in answer to the 19th cross-interrogatory, he says much the same thing.

To these unqualified denials of the four persons who were most prominent in the management of the Railroad Company and who are charged to have made this contract with a view to their personal advantage, we have in addition a series of circumstances, about which there is no dispute, which speak in a concurrent and decisive voice to the same effect.

1. The plaintiff's course shows that there could have been no such agreement until long after the contract was made.

He entered upon its execution, acting entirely upon his own judgment, without responsibility to any one.

He testifies at page 108:

"On the 16th of July, 1868, by telegraph from New York, we ordered mining cars and tools to be shipped from Missouri to Carbon station, on the Union Pacific Railroad, and miners to be employed in Missouri, so that by the time I returned home, quite a number of men were ready to go. We sent out forty eight persons; and I arrived at Carbon about the 12th of August, 1868. I took entire charge of everything at the mines and all the outside business, except the books and matter of that kind. Mr. Godfrey took charge of the books and business of the office, and employed Dyer O. Clark. We opened mines at Carbon, in August, 1868. I opened mines at Point of Rocks, in October, 1868; and in November of the same year at Rock Springs; in December, 1868, at Alney, all in Wyoming Territory."

And at page 110, he says:

"I invested in money and credits about seventy-five thousand dollars. I invested, as I remember, about thirty-four thousand dollars during the first

month, before any moneys were placed to my credit. Besides that investment of so much cash, I raised money in the bank on my own name and on my own collaterals; but I cannot remember how much. It was all the money required for the enterprise, and was the only money furnished during that year, except the cash advanced, being the sum of twenty-one thousand seven hundred and fifty dollars, and the sum of twelve thousand dollars paid on account of coal, by the Union Pacific Railroad Company; and the sums of one thousand two hundred and fifty dollars paid by Godfrey, and of seven hundred and fifty dollars paid by William S. Watson; the same being all the money paid by them, (Godfrey and Watson) until they sold out to me their interest in the business. (Watson was at first interested with Wardell and Godfrey.) I invested it in labor and materials for the opening the mines and paying off the men, who were prospecting for coal at Carbon, as requested by Mr. Dillon."

At page 113, he says:

"The books having been taken out of my hands, I am unable to give a detailed statement of my expenditures. They will all appear upon the books of account, which were taken out of my hands, and are now held by the officers of the Railroad Company."

These large expenditures by the plaintiff from his own money and upon his own responsibilty alone, are entirely inconsistent with the theory that while they were being made, there was any agreement that the large capitalists named in the answer, were to share with him the profits of the enterprise.

2. And their conduct is equally inconsistent therewith.

They refused to advance money for the enterprise in proportion to the interest which, it is claimed, they were to have. The contractors for building the road did advance $21,750 shortly after the contract was made, and $12,000 afterwards; but that was all; whereas he invested $75,000—more than twice the aggregate of those sums.

In 1868, he delivered to the Company 8755 tons, for which he received nothing (see page 113). They paid no attention to the enterprise until December, 1868.

Wardell says, at page 109, that:

"From the beginning, Godfrey and myself intended forming a corporation which should execute the contract, and carry on the business in that way. The capital stock, first contemplated, was sixty-five thousand dollars,"—of which he took $25,000, Godfrey took $25,000 and Watson $15,000. He then says that

when he bought Godfrey out, which was in September, 1868, he learned from him that John Duff in a conversation with him (Godfrey) proposed for himself and others to take eight-tenths of the business, and furnish the money for the entire investment to carry on the contract.

Shortly afterwards, Wardell met Mr. Durant and stated this fact and he assented to it. Then Wardell determined to organize a company with a capital of $500,000, and by direction of Durant drew on Bushnell and Duff for $21,750 to apply thereon, the draft was dishonored. (See page 111).

In November, 1868, Wardell framed articles of incorporation, and sent the book of stock-subscriptions to Mr. Durant, in New York, but heard nothing from it. Nor until December was anything done by these parties in any degree or manner recognizing the enterprise, as one which concerned them. At that time, a subscription paper was drawn and signed by Dillon, Durant, Ames and Wardell; which paper, Durant took to New York, and has since retained.

This surely is not the couduct of men interested as early as July, 1868, in an enterprise of the importance and value attributed to this one by the Railroad Company.

But from the time that these persons signed the

subscription to the stock, they acted in hostility to the plaintiff, the contract and the enterprise.

In August, 1869, while yet in as undisputed sway of the Railroad Company's affairs as ever, they arbitrarily reduced the price of coal from the contract price of $7.00 to $3.50; and never afterwards paid a higher rate.

This is expressly admitted in the answer, at page 29.

Again, Wardell says (page 122), "while the mines were idle for the want of empty cars to load the coal, the Railroad Company was taking coal from others, in violation of the contract, made with Godfrey and myself, exceeding the amount used by them, as shown from a dispatch which I received from one Batcher, who was at the time the train dispatcher of said railroad, which is hereto annexed and marked L. While I had but sixty-five cars in the month of February, 1869, two hundred and thirty-five cars were loaded in the same month, with coal taken for its own use, by the Railroad from one M. S. Hall."

He speaks again on this subject at page 125: "After the month of September, 1868, I had got men enough to mine a very large quantity of coal, which, in my opinion was sufficient to supply the wants of the entire western portion of said Railroad, at that time;

but the Railroad Company refused to supply me with all the cars I could load, and took a large portion of their supply of coal from Edward Creighton, John A. Morrow, A. M. Green, and M. S. Hall; thereby keeping my mines idle, a large portion of the time, at great cost."

When he complained of this to Durant, that officer directed him to dump his coal at the mouth of the pit, and said the Company would receive it there.

Several thousand tons were so dumped; but the Company would not receive it, and a heavy loss resulted.

Another circumstance of importance in this connection, is the fact the persons who are charged to have contrived this contract for their personal profit out of the coal to be sold to the Company, were very largely interested in its stock.

Mr. Durant says, at page 154, that he owned one-fifth of all stock of the Union Pacific Railroad Company. The other gentlemen were large holders. Whatever should be taken from that Company, was taken from these gentlemen; nor could they expect that their gains from the contract, would equal their losses as stockholders of the Company.

And again: never, from first to last, was a dividend made among them or among any parties on ac-

count of the profits arising from the execution of this contract. So that the case alleged is that of men entering into an illegal and grossly dishonest contract, which was in violation of their own interests, from which they receive nothing, in hostility to which they frequently acted, and to the advancement of their interests under which, they contribute neither their money, their time nor their attention.

It is said that children do, for the sake of doing; and these men are here charged with doing wrong, not for gain, for that they neither get nor seek, but for the wanton sake of doing wrong.

We must turn now to the evidence adduced by the Company in support of these charges.

It consists of the testimony of Mr. Bushnell and Mr. Godfrey.

Bushnell testifies, at page 227:

"Mr. Joseph Richardson, early in 1868, introduced C. O. Godfrey and Thomas Wardell to me, as experts in the discovery and mining of coal, and said that they were then operating along the line of the Hannibal and St. Joseph Railroad, in Missouri; that they were desirous of entering into a contract with the Union Pacific Railroad for the discovery and operation of all the coal lands along the line of road; and that they were willing to receive one-half of the profits or

benefits themselves, and would divide the other half with us. I introduced them to Mr. John Duff, a director of the Union Pacific Company, and stated to him their willingness to divide one-half the profits with us and retain one-half themselves. He remarked to me that he would not allow them one-half or anything like it. That covers all my negotiations in the matter. Mr. Duff, after considerable negotiation with them, entered into an agreement with them, whereby a contract should be executed between Mr. Ames, the acting President of the Union Pacific Company, and themselves, which negotiation resulted in the contract dated July 16, 1868."

Now, all that is here stated about Mr. Joseph Richardson, and the witness introducing Wardell and Godfrey to Mr. Duff, or being present when they met Mr. Duff, is simply false; and is by this record proved conclusively to be false.

Wardell testifies, at page 105, that on his return from the country into which the road was building, whither he had gone on his own motion to examine the coal deposits, he met Joseph Richardson, to whom he explained his business. Richardson went with him to the mines which he, with Godfrey, was operating in Missouri, and, after examination of their works and methods, advised them to seek this contract, and

promised to meet them in New York and introduce them to the directors. He then says:

"Godfrey and I arrived in New York about the 9th of July, 1868. We went to the office of the Union Pacific Railroad Company, at 20 Nassau Street. Mr. Richardson did not meet us or introduce us, as he said he would. After waiting in the office a long time, and not seeing him, a gentleman came in there, and Mr. Godfrey walked up to him and said he believed that was Mr. Duff. Godfrey introduced himself, and said we had come there for the purpose of seeking a contract with the Union Pacific Railroad Company, to mine and supply it with coal."

Then follows a detailed account of the conversation between Wardell and Godfrey and Mr. Duff, when they gave him the figures for which they would mine and deliver the coal. Mr. Duff told them to leave their proposition, and the Board of Directors would consider it. Thereupon, they left the city, not returning until the 15th of July; nor, in the meantime, seeing any one connected with the Company.

Godfrey, who is the Railroad Company's main witness, says, at page 235, that Mr. Wardell and Mr. Watson took a trip over the Union Pacific Railroad. "That was the latter part of May, 1868, or June, 1868 —I am not positive. It was very soon before going

to New York. When Mr. Wardell returned from that trip, he came soon after to Hannibal, with a Mr. Richardson, Joseph Richardson, then of the Union Pacific, and introduced him to me as one interested in the Union Pacific, and one who would introduce us to the New York Board. This was early in July, 1868. On the 5th of July, or thereabouts, we started for New York, Mr. Wardell and myself, and arrived there on the evening of the 8th, or the morning of the 9th of July. We went to the general offices of the Union Pacific Railroad Company at 20 Nassau Street, expecting there to meet this Mr. Joseph Richardson, who was to introduce us. I had some former acquaintance with the name of John Duff, but no personal acquaintance with the man. My partner in the real estate business had been Joseph Hunt, President of the First National Bank of Hannibal, of which I was a director. Through Mr. Hunt, Mr. John Duff had sent a list of lands he owned in Northern Missouri, to pay taxes on them; ten or twelve pieces of land. The name of our firm was Hunt, Godfrey & Co. Hence, when I went to New York, I had relied somewhat upon that experience to make myself known to Mr. Duff. I also relied upon Mr. Sidney Bartlett, and others in Boston. I had previously asked Jas. F. Joy for a letter of introduction to Union Pacific people, and I had such a letter;

the date of it I have forgotten. We went into the large room which I judge was used as a bank or fiscal agency, there being counters and desks similar to a bank. We somewhat timidly took seats, waiting and hoping to meet Mr. Richardson. He failing to come, however, after our sitting there quite a length of time, a gentleman came in that I imagined to be John Duff. I had seen him years before when he was a contractor of the Hannibal and St. Joseph Railroad. I asked him if it was Mr. Duff, and told him I was of the firm of Hunt, Godfrey & Co., of Hannibal, and desired to talk with him about coal on the Union Pacific Railroad;" and, at page 246, he says the interview with Mr. Duff was not longer than fifteen minutes; and immediately after it they left the railroad office. Neither during that day nor at any time afterward, until October, 1876, did they not see Mr. Richardson. They went to his lodgings, but not finding him, returned to the office when he introduced himself to Mr. Duff.

With this introduction of himself to us, we proceed further to examine the testimony of Bushnell.

At page 228, he says that "it was understood that the directors and stockholders of the Union Pacific Railroad Co. were to be interested to the extent of 9-10 interest in said contract, through the stock of a Coal Company to be organized. I know the Wyoming Coal

Company was organized in pursuance of that negotiation and arrangement."

But in answer to 6th cross interrogatory for the particulars of the agreement, he says, at page 229, "I do not know what place in detail was agreed to, whereby 9-10 was to be distributed to us, or whether a corporation should be organized for the purpose of executing said contract. I intended and expected and was determined to have an interest in that contract, by reason of the fact that I was a large stockholder in the Union Pacific Railroad Company; that I was then and always have been in favor of every stockholder in it having the same opportunity that I determined to have myself; and that I would take it when I thought it to my interest to take it."

This testimony is too vague and indefinite to be of value. The time, place, parties and circumstances of the alleged understanding cannot be given from aught that he says. As to the time, it might have been after the contract was made, and the rights of the parties fixed by it. As to the parties, it may have been a purpose existing in his mind alone, or in the minds of other directors, to which Wardell and Godfrey were ignorant, and to which they never assented.

But more than all, the understanding, as the witness states it, was not fraudulent; it did not reserve to

the directors any personal advantage over the other stockholders; all of whom alike were to have the benefit of it, whatever that might prove to be.

This is the extent and whole effect of the testimony of Mr. Bushnell.

Now, before examining Godfrey's testimony, observe how he comes into the case.

1. He had for years been Wardell's partner; he was interested in this enterprise at first, and sold out to Wardell for $10,000. With this previous connection, implying a certain degree of confidence and fidelity, he tells us that, of his own motion, he came to Omaha from Hannibal, Missouri, three several times, to look into the testimony in this case, and at once fell in with the counsel for the Railroad Company, with whom he went over Wardell's and the other testimony which, at that time, had been taken.

2. He has made another statement in writing which conflicts with his testimony and his explanations of it are lame and unimportant to the last degree. And when he met Wardell at Dyser's office for the purpose of signing the first statement he affirmed its truth, but declined to subscribe it, because he had another out which conflicted with it; and then to fortify his character for truth, he says he had the largest Sunday School west of Chicago.

See Dyser's deposition page 168 and Watson's at page 182:

3. It is very clear from his own deposition, that while the proofs in this case were in preparation and being taken, he was coquetting with the parties on both sides; seeking some personal advantage from one or the other; seeking from Wardell, a renewal of their connection in business; and that Wardell declined all his advances. Then he comes to the stand, a voluntary witness with a story well digested and measurably at least reduced to writing from which he speaks.

4. And this is to be said of his testimony taken as a whole, given upon the most careful preparation from minutes in his hands, that in its details, it is contradictory, that it is vague and indefinite in respect of material matters, and that it is in some particulars highly improbable. It is to be credited only with caution, and, we submit, only when otherwise supported.

He says he had from several conversations with Mr. Duff with whom he negotiated the contract.

One was on the 9th of July, his account of the circumstances of which has already been quoted. He says, at page 236, that when he told Mr. Duff that they desired the contract, that gentleman answered: "You are the eighth or ninth man that has been here to talk about coal on the Union Pacific. We propose to keep

that ourselves." He said, in reply, "I am here prepared to give you one-half of all that can be made out of it, and to pay all the bills." There was some further slight conversation; the prices proposed were given; then Mr. Duff told them to return in eight or ten days, when an answer would be given to their proposition.

It is incredible that in this interview between these men who had never met before, Mr. Duff said that the directors or any of them intended to keep the coal interests for their individual advantage. It is equally incredible that Godfrey proposed to give them a personal interest in the contract which he solicited.

On cross-examination, at page 249, he varies his statement materially, implying that he individually was willing to take half the profits, Wardell not being then a party to the conversation.

And when afterwards, as he says, the division of these spoils was spoke of, he had not this former offer of his in his mind—showing that he did not attach to it the significance he now seeks to attribute to it.

The next conversation was on the 15th of July—meanwhile he and Wardell had been absent from the city and prepared the contract ready for execution.

His account in chief of that interview is given at page 237; in the course of it he says, "Mr. Duff turned

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The next conversation was on the 15th of July—meanwhile he and Wardell had been absent from the city and prepared the contract ready for execution.

His account in chief of that interview is given at page 237; in the course of it he says, "Mr. Duff turned

to me and said, 'you can't have half of this contract; you will be whittled down to a tenth.' At that time, my impression was that he meant a tenth for me and a tenth for Wardell. After the paper had been interlined and fixed as Mr. Duff intimated it would be signed, it was given to me, and Mr. Wardell and myself went to hunt a copyist who was also a notary."

On page 251 he again states that on the 15th when they left Mr. Duff, the terms of the contract were agreed to, but he also says: "I can't say that the question of the tenth interest was discussed that day. As stated in my direct testimony on this 15th day, I don't know that it was discussed; my impression is that (the giving up of the nine-tenths interest and retaining one-tenth) wasn't stated to us on the first day;" that is the 15th of July.

This very clearly shows that, testifying, in chief from notes, after careful preparation, he sought to convey a false impression of the facts, namely, that the conversation about the interests was on the 15th, when such was not the fact.

The third conversation was on the morning of the 16th, when they brought in the engrossed contract ready for execution. It preceded the execution of the contract and extended through the day. At this time

he says, the proportions of the interests were discussed between him and Mr. Duff.

The fourth conversation was after the contract was executed. Then Mr. Duff told Mr. Crane, who was the treasurer of the contractors for building the road, to honor the drafts of Godfrey and Wardell.

It is evident that the proposition to advance money on this contract proceeded from Mr. Durant. He says he did not know of the negotiations until he saw the contract executed, and then he objected to it because the money to be invested by Wardell and Godfrey in developing the mines, was altogether insufficient and he proposed that the necessary funds be advanced.

At this time, the Railroad Company was without available means while the contractors were in funds; for which reason the money was to be advanced by them.

Upon a fair view of all the testimony it is confidently submitted that it was not until Mr. Durant made this suggestion, and after the contract was executed that anything was said by any of the parties about a division of the interests. Nor then was anything definite agreed to; because, as Mr. Durant says, it was left until he should go out on the line and examine the situation which he did the next day.

Admit that Godfrey tells the truth about his third conversation with Mr. Duff, the charge of the answer is not established; for he says, expressly, he does not know to whom the benefit of the nine-tenths interest was to go, whether to Mr. Duff and his associates or to the stockholders; while Mr. Duff, Mr. Dillon, Mr. Bushnell and Mr. Ames each says, that he had no agreement for a personal advantage, but whatever agreement was made was for the stockholders of the Railroad Company.

The inquiry then becomes pertinent: Why did not the Company retain the administration of its coal interests in its own hands? The explanation is at hand. It is given by Mr. Ames in his sworn answer to a bill filed by Davis in 1870. That answer is as follows:

"In the operation of so long a line of road, in a country almost wholly destitute of wood, it was of the greatest importance to the said Railroad Company to discover a sufficient supply of coal, which was believed to exist near the line of the road, and to get and retain the control thereof for its use and benefit; that without such supply the successful supply of the said Company's road was impossible; and that for the purpose of prospecting for and supplying it with coal when discovered, and keeping such supply within its control

and not subject to the combinations of private parties wholly disinterested in and, in many instances, hostile to it, said Wyoming Coal Company was organized and solely for the purpose above named; and that the entire stock is held for the benefit of said Railroad Company save and except one-tenth thereof, which is owned by the superintendent of said Company, a practical prospector and miner, whose experience and skill was necessary to the successful prosecution of the object of said organization, and could not otherwise be obtained."

This method of operating the mines is not uncommon in such enterprise; namely, of enlisting the best experience and skill by personal interests in them. And such a scheme is not obnoxoius to objection—certainly not to the charge now made.

Nor is it just to say that this explanation of Mr. Ames was an after-thought, in order to screen these men from the odium of a breach of trust. That solution convicts these men, every one of them, Bushnell included, not only of that offence but the greater one of perjury.

It is borne out by the resolution of the 17th of May 1869, that nine-tenths of the stock of the Coal Company should be distributed among the stockholders of the Railroad Company, which is set out in the bill

at page 7, and which was not pursued simply because, as Bushuell explains at page 228, the directors were occupied with the financial condition of the Railroad Company, and had not time to attend to it.

Now, it is confidently submitted upon the principle that the presumption is in favor of innocence, and not of guilt, that if an honest and just purpose can be attributed to these parties in this transaction, such is the manifest duty of the court. Doubt is not sufficient; suspicion, inflamed suspicion, is not sufficient; decisive proof will alone answer. And when the presumption, is supported by the positive oaths of parties charged with corruption, a case beyond a reasonable doubt, must be established against them.

Nor does the contention of the Railroad Company gain any support from the terms of the contract.

The stipulated price of the coal was two dollars less than the Company was paying at the time, and considering the circumstances, was reasonable.

The lease of all the coal lands was not of considerable extent in fact; for at the time coal had been found at only one or two points; nor, since that time, has it been found, at more than five places; and at some of these on government and not railroad lands.

Fifteen years was a reasonable duration of the contract, considering the expenditures required for im-

provements, and which, at the end of the term, would necessarily be abandoned, or, if removed, be of little value.

The stipulation for the drawback of freight, is usual in railroad contracts, with parties engaging in new and large business on the line, and was much more than compensated by the royalty reserved.

The strictures upon the contract are effectually met by Mr. Durant, at page 152, in answer to the Company's own interrogatory.

## SECOND POINT.

But for the purposes of the argument let it be admitted that this was a vicious contract; it has been intelligently ratified by the Railroad Company. This appears from its own records, to which it has itself appealed, and which are set out at page 286, *et sequ.*

It appears from them that, on the 19th of November, 1869, a preamble and resolution were passed directing the General Superintendent to disregard the contract. This resolution seems not to have been pursued. On the 5th of August, 1870, the following was, on Mr. Bushnell's motion, passed:

"WHEREAS, 90 per cent. of the stock of the Wy-

oming Coal Company is the property of this Company, therefore,

"*Resolved*: That the the General Superintendent be requested to co-operate fully with the Superintendent of said Coal Company, so that all possible returns may be secured from the disposal of coal and from freight; and that no coal be purchased of any other parties for use of the Union Pacific Railroad Company."

On the 11th of March, 1872, a committee was raised to collect all information, relative to the contract and matters incident thereto.

On the 11th of September, 1872, a resolution was passed that proceedings, be instituted to annul the contract.

On the 13th of December, 1872, the whole matter was referred to the executive committee with power.

On the 18th of December, 1873, a resolution was passed, that no more money be paid the Wyoming Coal Company, until accounts were rendered and put in a satisfactory condition for settlement.

On the 10th of March, 1874, a committee was raised to settle with, and buy out Wardell.

On the 12th of the same month, all matters relating to the Coal Company, were referred to the executive committee.

On the 22d of September, 1875, a resolution was passed, declaring that it was believed that the contract was invalid, and appointing a committee to agree on terms with the Coal Company for a cancellation of the contract.

This committee reported that a settlement could be made for $1,000,000; the Coal Company agreeing to cancel the contract and discharge the Railroad Company from all claims.

This was effected, so far as was possible, without Wardell's consent.

At the meeting of the directors of the Railroad Company on the 13th of December, 1872, when the subject was referred to the executive committee with power, the whole matter was under discussion before a full board, which dicussion was participated in by Mr. Bushnell, Mr. Duff, Mr. Augustus Schell and Mr. L. P. Morton. At this meeting, Mr. Duff, Mr. Dillon, Mr. Ames and Mr. Bushnell stated, and the last three signed a paper to the effect, that their subscriptions to the stock of the Coal Company were for the Railroad Company, and that they never had any personal interest in it. Mr. Durant was not at this time a director, but similar statements were made by him (see Schell's deposition, page 223).

Thereupon, a meeting of the directors of the Coal

Company was organized, with Mr. Duff in the chair; when, in presence of the Railroad Company's directors, a series of resolutions, drawn by Augustus Schell, who was a director of the Railroad Company, but otherwise with no connection with the Coal Company, were presented by Mr. Bushnell, and passed.

It will be found at page 209, and is as follows:

"WHEREAS, Cyrus O. Godfrey and Thomas Wardell did, in consideration of one dollar and other valuable considerations, by assignment, bearing date the 1st day of April, 1869, transfer, assign and set over to the Wyoming Coal and Mining Company, a certain contract theretofore made between the Union Pacific Railroad Company and the said Cyrus O. Godfrey and Thomas Wardell, bearing date the 16th day of July, 1868, together with all benefit and advantage thereof, and,

"WHEREAS, on the assignment of said contract, it was intended and agreed between said Godfrey and Wardell, the Union Pacific and this Company, that the capital stock of this company was to be represented by said contract, and that shares, representing the capital stock were to be issued to the said Cyrus O. Godfrey and Thomas Wardell, as paid stock, and,

"WHEREAS the said Cyrus O. Godfrey has assigned and transferred to said Thomas Wardell all his inter-

est in said contract so assigned as aforesaid, and all interest in the stock to be issued therefor, now, be it

*Resolved*: That this Company do issue to said Thomas Wardell 5,000 shares of the capital stock of the Wyoming Coal and Mining Company, being the whole amount of the capital of said Company, as full satisfaction of the consideration of the assignment of said contract by Cyrus O. Godfrey and Thomas Wardell—it being understood that said Wardell shall assign to the Union Pacific Railroad Company, 4,500 shares of the capital stock of this company, immediately on the issue thereof, without recourse."

A further resolution was, at the time, passed, abrogating the clause of the contract in respect of drawback on freight. Mr. Wardell refused to receive and assign the stock for fear of personal liability, against which the guarrantee of the Company was offered, but which he thought insufficient.

There were also further acts of the Company in the same direction.

At page 120, Mr. Wardell says that, "in the summer of 1873, the directors, including Horace F. Clark, John Duff, Augustus Schell, Albert Keep, F. Gordon Dexter and others, went out over the road, and invited me to go with them. We went to the mines at Carbon and Rock Springs, and went through the mines at Al-

ney, and examined the mines at each point. They all expressed great satisfaction with them, and with the way in which I was conducting the business; particularly Horace F. Clark expressed himself very strongly in my favor; and he promised that I should have a full settlement of everything on the terms of the contract, just as soon as my accounts could be made up to date; and he directed J. W. Gannett, the auditor of the Railroad Company, to go over my accounts with me, and examine them fully, and credit up the difference between the rates credited to us on the books of the Union Pacific Railroad Company and the contract price; also to credit up the drawback of twenty-five per cent. on all amounts paid by us for freight; to reconcile all small differences, so that our accounts would agree. The order to Mr. Gannett was made after we had returned to Omaha, and was made at the Metropolitan Hotel."

He proceeds to say that Mr. Gannett did as directed, found the accounts correct, so certified them, and they were sent to the Company's offices in Boston.

These proceedings show a decisive ratification of the contract. They were had upon mature deliberation, and with an intelligent appreciation of all the circumstances under which it was originally made, and of the rights of the Railroad Company. Whatever

the origin of the contract, it became, by these proceedings, binding upon all parties.

Nor, to this result, is any objection made, except that the Railroad Company was still under the malign influences of the vicious men, who made this vicious contract.

But, bad as they may have been, their adverse interest had been eliminated by their own acts; it could not be alleged against the contract. It now stood as if it had never been tainted by their touch. And, this the more, because, in point of fact, they had never derived one dollar's advantage from it, and therefore held no illicit gains which they should restore to the Company.

The pretense is not reasonable, that they, who were only four in number, Dillon, Duff, Ames and Bushnell, maintained sway in a direction, composed of thirteen members, in support of their personal interests against those of their associates and the Company; and especially when, under the stress of the repeated attacks upon the contract, and inquiries into the circumstances of its origin, they were compelled to and did surrender their interests to the Company.

But, however this may be, when that surrender was made, and the Company accepted it, and proceed-

ed to act upon the contract as valid, the Company became bound by it, as if it never had a taint of evil.

## THIRD POINT.

If the court shall find either that the contract was not vicious for the reason alleged against it, or that, the vice having been eliminated, it was intelligently affirmed by the Company, it becomes necessary to inquire what the interests of Wardell are.

1. If there was an agreement that he should have only one-tenth interest, that disposes of the matter.

2. But Godfrey does not make that clear, even if his testimony upon it is to be accepted as a correct statement. He says he told Mr. Duff that Watson was interested in the enterprise; and it is fair to imply, from what he says, that Watson was to have an additional interest, which came to Wardell.

3. If, on the other hand, there was no agreement on the subject, then Wardell's interests must be measured by one or other of two principles.

Under the subscriptions to the capital stock, which aggregated $335,000, there was a large surplus not taken. He subscribed for one-tenth of the whole capital, and is, in addition, entitled to his proportion of that untaken.

Or, as the subscriptions, but to a comparatively small amount, were not paid, and he held the contract and supplied nearly all the money and skill and attention which assured the success of the venture, an allowance for what was contributed otherwise, may be charged against him and the residue assigned to him.

## FOURTH POINT.

Wardell's interests, whatever they were, were not divested by what has been done by any of the defendants in this cause.

1. If the court shall be unable to find in the record evidence of an agreement limiting his interests to one-tenth, then the proceedings of the meeting of the 15th of December, 1872, did not have that effect. The attention of the court is earnestly requested to his account of the proceedings of that meeting, at page 114, as well as to Mr. Poppleton's, at page 278, *et seq.*

Badgered, and left alone to contend against numbers of adversaries, all he could do was to withhold his consent; and once free from the arrogant and rude conduct of the President of the Railroad Company, he refused to accept the assignment of the stock.

It may be well to say, in passing, that at another meeting, held on the 16th of December, the resolution,

that the stock be all issued to him, was rescinded; and another passed directing its issue to Bushnell, who should assign one-tenth thereof to Wardell, and the rest to the Railroad Company.

2. Nor were the interests of the plaintiff affected by the action of the two companies had in September, 1875, by which a formal settlement of all matters between them was made, including the cancellation of the contract of July 16th, 1868.

(1.) The object of that settlement is to be noted. In March, 1874, he went to Boston to obtain a settlement of his accounts; the same having been examined and approved by Mr. Gannett; while there an attempt was made to buy him out. He says, at page 121, that $80,000 was offered him by a committee of the Railroad Company, sent to him for the purpose.

The purchase not being effected while he was in Boston, without any intimation to him, an order was sent to the administrative officers of the road on the line, directing them to seize and hold all the Coal Company's property, business books and effects. This was at once done, and all of them have ever since remained in the hands of the Railroad Company. Thereupon this bill was brought

Pending the bill, the settlement between the two Companies was effected, by which it was pretended

that $1,000,000 was paid by the Railroad to the Coal Company. The latter Company then repaid the Railroad Company $900,000, as the owner of the nine-tenths of the whole sum, and offered Wardell $100,000 for his tenth. The proceeding was a thinly disguised scheme to compel him to take, for his interest, what he had before refused.

(2.) The proceeding was void for several reasons. It was had by a Board of Directors of the Coal Company, every member of which was interested in the Railroad Company, adversely to the Coal Company and to Wardell.

(3.) But the settlement was not within the general authority of the directors of the Coal Company. It was beyond their powers, because it operated a complete divesture of that Company of all its property which was essential to its business.

*Story, J. in Beaston v. Farmers' Bank, 12 Peters 138.*

*Lord Campbell in Simpson v. Westminster Hotel, 8 H. L. Cases, 712, 718.*

*Copeland v. Gas Light Co., 61 Barb. 60.*

*Abbott v. The Hard Rubber Co., 33 Ib. 578.*

*Robbins v. Clay, 33 Me. 132.*

(4.) This action is void, because had without the jurisdiction of the sovereignty from which the Coal

Company derived its existence. It was the exercise of the most vital powers of the corporation. The parties to it are the parties here, not others who have been unconsciously drawn into dealings, or a situation, in ignorant reliance upon the validity of the action.

*Hillis v. Parish, 14 N. J. Eq. 330.*
*Ormsby v. The Termont, &c., Co., 56 N. Y. 623.*
*Galveston Railroad Co. v. Cowdry, 11 Wall. 459.*

(5.) To none of these meetings—and especially that at which this action, so fatal to his interests, in every way was had,—was the plaintiff warned, and by the action he is in no way bound.

*Const v. Harris, Turn & R. 496, 525–7.*
*The people's, &c., Co. v. Westcott, 14 Gray, 440.*
*Stow v. Wyse, 7 Conn. 214, 219.*

We are entitled to an account not only of the dealings and transactions of the Companies, down to the seizure, but also of the coal extracted by the Railroad Company from the mines at the contract rates, down to the present time.

JAMES M. WOOLWORTH,
JAMES O. BROADHEAD,
Of Counsel for Appellant.

# SUPREME COURT OF THE UNITED STATES.

[No. 167.]

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THOMAS WARDELL, Appellant,

*vs.*

THE UNION PACIFIC RAILROAD COMPANY, *et al.*

The said appellant alleges against the decree of the Circuit Court the following errors therein:

1. That the said decree awards to the said appellant $100,000 only, whereas it should have declared the interest of the said appellant to be one-tenth of the entire matter involved in this controversy.

2. That the said decree should have directed an account of the earnings, property and business of the Wyoming Coal & Mining Company, upon the basis of the contract of July 16th, 1868.

3. That said decree should have affirmed the validity and ratification of said contract by said railroad company.

4. That said decree should have held that the seizure of the property here in question was illegal, fraudulent and void, and should be restored to the Wyoming Coal & Mining Company, with compensation for such damages as it may appear to have sustained by reason of such seizure.

JAS. O. BROADHEAD,
JAMES M. WOOLWORTH,
*of Counsel for Appellant.*

FILED
DEC 20 1890
JAMES H. McKENNEY, Clerk

IN THE

# Supreme Court of the United States.

[No. 167.]

THOMAS WARDELL, *Appellant*,

*vs.*

UNION PACIFIC RAILROAD COMPANY *et al.*

*Appeal from the United States Circuit Court for the District of Nebraska.*

## STATEMENT AND BRIEF AND ASSIGNMENT OF ERRORS FOR APPELLANT.

JAS. O. BROADHEAD,
*Solicitor for Appellant.*

IN THE

# Supreme Court of the United States.

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THOMAS WARDELL, *Appellant*,

*vs.*

UNION PACIFIC RAILROAD COMPANY *et al.*

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*Appeal from the United States Circuit Court for the District of Nebraska.*

## STATEMENT.

This is a bill in equity, brought by Thomas Wardell, the appellant, against the Wyoming Coal & Mining Company; the Union Pacific Railroad Company; John Duff, of the city of Boston; Thomas C. Durant, Charles A. Lambard and Sidney Dillon, of the State of New York; Cornelius S. Bushnell, of the city of New Haven; James W. Davis and Andrew J. Poppleton, of Omaha; Oakes Angier Ames and Oliver Ames, executors of Oakes Ames, deceased, and Oliver Ames, of Massachusetts.

The suit was founded on a written contract dated the 16th day of July, 1868, between the Union Pacific Railroad

Company of the first part, and Cyrus O. Godfrey and Thomas Wardell of the second part,

By which the company agreed that the parties of the second part might at their own expense prospect for coal along the line of the road and its branches and extensions;

Open and operate any mines discovered, at their own expense;

That it would facilitate their operations in prospecting by means of such information as it possessed, and furnish passes over its road to their agents, not exceeding six in number;

That it would put in switches and necessary side-tracks at such points as should be mutually agreed upon for the accommodation of the business of the parties of the second part;

That it would give them the same rates for transportation of coal for general consumption as it charged to others, and also a drawback thereon of twenty-five per cent. in consideration of their efforts to increase the demand for coal by outside parties;

That it would furnish them with all cars required in the operation of their business, and transport them as promptly as possible;

That it would lease them the coal lands owned by the company for the period of fifteen years, for the purpose of working them, as might seem to them profitable;

That it would purchase from the parties of the second part all clean merchantable coal mined along the line of its road, delivered on the cars at the mines, and needed by the company for its own purposes;

And finally, that it would pay therefor as follows:

1. For the first *two* years, $6 per ton.
2. For the next *three* years, $5 per ton.
3. For the next *four* years, $4 per ton.
4. For the *six* remaining years, $3 per ton.
5. These sums were not to be less than ten per cent. added to the cost of the coal to the parties of the second part.

In consideration of which the parties of the second part, Wardell and Godfrey, agreed on their part,

That they would open and operate mines on the line of the company's railroad, at such points where coal should be discovered, as it should desire;

That they would make all necessary exertions to increase the demand and consumption of coal by outside parties along the line of the railroad;

That they would expend, within the first five years from the date of the contract, not less than $20,000 in the purchase and development of mines and mining lands, and in improvements for the opening and successful and economical working of the same;

That they would furnish the company, for its own use, good merchantable coal, and pay all expenses of improvements for loading coal into cars;

And that they would pay, for the first nine years of the contract, a royalty of twenty-five cents per ton for each ton of coal taken from their lands, except coal taken from entries, air courses or passage-ways, no royalty to be paid for the last six years, unless the price of coal during those years should be $3.25 or over per ton.

A few months after the making of this contract, Godfrey sold out his interest in the contract to Wardell.

After Godfrey sold out, a corporation was formed for the purpose of carrying on the business under the contract, called the Wyoming Coal & Mining Company, to which corporation the foregoing contract was assigned; and thereafter

the business was carried on in the name of the Wyoming Coal & Mining Company; and the appellant, Wardell, as superintendent, secretary and general manager of the coal company, operated the mines and delivered coal to the railroad company up to the 13th of March, 1874, at which time the appellant claims that the railroad company was largely indebted to the coal company for coal so delivered. On that day the officers and agents of the railroad company took forcible possession of the mines, books, papers, implements, tools and personal property of the coal company, and have held and used them ever since.

The appellant in his bill alleges that a majority, if not all, of the directors and stockholders of the coal company, except himself, being also stockholders and directors in the railroad company, he could obtain no relief by any action of the coal company against the railroad company, and he prays the court for such relief, and that an account be taken of what is due and owing for coal delivered to and received by the railroad company from the 16th of July, 1868, to the time of the seizure of the property, whether the delivery of the coal was made by the appellant, or by the coal company;

Of what is owing by the railroad company as drawback on freight money;

Of what is owing by the railroad company for coal extracted from the mines since the seizure, and at the prices fixed in the contract;

Of the property seized by the Railroad Company and the value thereof;

Of the damages arising from the seizure and attempted abrogation of the contract;

That the rights and interest of the several parties be ascertained and declared;

That certain proceedings of the Wyoming Coal & Mining Company, of the 13th and 16th of December, 1872, be declared illegal, inoperative and void:

And for general relief.

The Union Pacific Railroad Company, in its answer to the bill filed in this case, alleges that the contract above set forth was a fraud upon that corporation; that the contract was made by the executive committee of the Board of Directors, the whole or a majority of whom were by agreement with Godfrey and Wardell to be jointly interested with them in the contract; that the organization of the Wyoming Coal & Mining Company was a device to enable the directors of the railroad company to participate in their profits, and had been agreed upon between them and Godfrey and Wardell before the contract of July 16th, 1868, was executed, and they therefore deny its validity and binding obligation on the company.

The railroad company in its answer further says, that at the time of the seizure of the property they owned nine-tenths of the stock of the coal company; that Wardell was at the time superintendent of the coal company, and had control of its affairs; that being wholly dependent for fuel to run their trains on the supply furnished by that company, and fearing that Wardell would not furnish that supply of coal, they were compelled, in self-defense, to take control of the property of which they claim to have been the owners in the proportion of nine to one.

They allege in their answer also, that afterwards the railroad company and the coal company, through their boards of directors, had a settlement of their transactions, by which the contract with Wardell and Godfrey was rescinded, and an indebtedness of the railroad company to the coal company of $1,000,000, was ascertained and agreed upon as a full settlement of all the transactions between them, and they set apart and tendered to Wardell $100,000, for his share in the coal company under that settlement.

Upon a hearing of the case upon the pleadings and testimony in the court below the contract was held to be fraudulent, but the court further held that the complainant was entitled to a fair compensation for his time, skill and services whilst engaged in the business, with a return of his money actually invested, and compensation for its use, the amount to be credited with what he has actually received out of the business.

And thereupon the court rendered a decree in his favor for $100,000.

As above stated, this contract bears date July 16th, 1868.

Wardell and Godfrey at once entered on their duties in discharge of the contract. In September, 1868, Godfrey, as he alleges, being unable to furnish his proportion of the money necessary to carry on the contract, and becoming alarmed at the risks likely to be incurred, sold his interest to Wardell, who continued to prosecute the business.

In November, 1868, articles were drawn up for the incorporation of the Wyoming Coal & Mining Company. These were not carried out, but on the 27th of January, 1869, further articles were drafted and recorded.

On the 19th of December, 1868, a subscription to the stock was signed at Omaha, by Durant, Dillon, Oliver Ames and Wardell, each taking five hundred shares of stock.

This paper was taken by Durant to New York, and was never in the possession of the Coal Company. It afterwards appears to have been signed by Duff for 500 shares, by Bushnell for 250 shares, by C. A. Lambard for 500 shares, and by J. W. Davis for 10 shares. In the month of February, 1869, a record was made of the meeting of the stockholders of the company, showing that Durant, Oliver Ames, Dillon and Wardell were present, representing each five hundred shares of stock, and the following persons appear to have been elected directors for one year, viz: Duff, Oliver Ames, Bushnell, Wardell and Davis. In May, the

directors met, and elected Duff president, Bushnell vice-president, and Wardell secretary and treasurer; at the same meeting a set of by-laws was adopted for the company.

At this last meeting a resolution was passed, accepting the contract of C. O. Godfrey and Thomas Wardell, made with the Union Pacific Railroad Company; also a resolution appointing a committee to apportion nine tenths of the stock amongst the stockholders of the Union Pacific Railroad Company, provided said stockholders of the railroad company should take the stock within thirty days after notice given by the committee.

That committee consisted of John Duff, Oliver Ames and C. S. Bushnell.

Also another resolution was passed at the same meeting, providing for an assessment of ten per cent. to cover the amount advanced by the stockholders, and ten per cent. additional to cover the present liabilities of the company.

None of these assessments upon the stock were paid, except in this way; after the contract was made, Wardell, Godfrey and Watson paid in five per cent. on $65,000; the contractors for building the road also advanced $21,750, which was credited to stockholders (without naming any one), and $30,000 was afterwards paid through Durant.

Wardell says in his testimony, that he and Godfrey intended from the beginning to organize a company to carry on the business, and that when Watson paid his five per cent. on $15,000, the intention was to form a company with a capital of $65,000, of which he was to have $25,000, Godfrey $25,000, and Watson $15,000. Wardell afterwards bought out Godfrey and Watson, before any company was actually formed—Watson and Godfrey both paid their assessments.

From that time until December, 1872, no meeting of the directors was held. But Wardell, acting in the capacity of secretary, treasurer and general manager, conducted the business of the coal company.

On the 13th of December, 1872, a meeting of the directors of the two companies was held in New York, when their affairs were discussed. Duff, Ames, Dillon and Bushnell admitted at this time that their subscriptions to the stock of the coal company were in trust for the railroad company. The directors of the coal company adopted a series of resolutions, reciting the making of the contract, its assignment to the coal company, the intention at the time that its stock should be represented by the contract; and that shares representing the capital stock were to be issued to Wardell and Godfrey, as full paid stock; and that Godfrey had assigned his interest in the contract and the stock to Wardell; and resolving that 5,000 shares should be issued to Wardell in consideration of the assignment of the contract, it being understood that he should immediately assign to the railroad company 4,500 of the said shares.

A resolution was also passed abrogating the clause in the contract providing for a drawback on freight, and also another electing Mr. Poppleton director, in the place of Mr. Davis.

Wardell refused to assign the 4,500 shares of stock to the railroad company, and on the 16th of December, another meeting of the directors was held in New York.

Wardell withdrew from the meeting, and thereupon a resolution was passed, rescinding the resolution of the 13th of December, and directing the issue of 500 shares to Wardell and 4,500 shares to Bushnell, with the expressed understanding that Bushnell should assign to the stockholders of the Union Pacific R. R. Company the 4,500 shares of stock. Wardell protested against the proceedings, claiming that the railroad company had not settled with him for what was due under the contract; and as he undertook to leave the room with the books, Poppleton seized them and took them from him.

Wardell continued to urge a settlement between the two companies under the contract. The debt of the railroad company to the coal company had become $1,300,000,

and its property was claimed to be worth $450,000; and in March, 1874, whilst these negotiations were still going on, the railroad company seized the office, books, records, papers, mining stores, and machinery of the coal company: and the railroad company has since carried on the business in its own name.

On the 29th of September, 1875, at a meeting of the board of directors of the coal company, a settlement was made between the two companies of all past and future claims, the railroad company paying the coal company $1,000,000; and a resolution was passed that nine-tenths of this sum be paid to the railroad company and one-tenth to Wardell; and afterwards a further resolution was passed, that 4,500 shares of the stock be issued to Mr. Bushnell, to be by him assigned to Mr. Dillon as trustee for the railroad company, and 500 shares to Wardell. The stock was issued accordingly; but the appellant, Wardell, never received the 500 shares of stock, nor the $100,000, the one-tenth of the amount pretended to have been paid by the railroad company to the coal company. Four of the directors of the railroad company were elected directors of the coal company, but Wardell took no part in these proceedings.

The prayer is that the rights and interests of the parties be ascertained and declared; that accounts be taken of the several matters involved, and that the railroad company and Dillon, Duff, Bushnell and Oliver Ames be decreed to pay the sums of money that shall be found due from the railroad company.

I. The first question for consideration is the validity of the contract of July 16th, 1868.

This contract is assailed as being invalid, on the ground. that when it was executed between the Union Pacific Railroad Company on the one part, and Godfrey and Wardell on the other, certain directors of the Union Pacific Railroad Company, namely, Duff, Dillon, Durant, Oliver Ames, and Cornelius S. Bushnell, who, as is alleged, were consulted

in regard to the contract, and who were at that time controlling directors of the Union Pacific Railroad Company, were to have an interest in the profits of the contract, and that this was understood at the time of its execution.

To establish this proposition, it must be shown satisfactorily, that such an understanding was had, previous to, or at the time of the execution of the contract; for if a binding and valid contract was made between the parties, before there was any understanding that the directors should participate in the profits, that fact does not affect its validity.

The principal witness whose testimony is relied upon to establish this charge, is, C. O. Godfrey himself. He commences his testimony by telling the court, that he had taken time to study the telegrams and books in his possession, that he might give his statements connectedly and thoroughly; and undertakes to impress the court in advance with the idea, that what he states, may be relied upon. He is very particular in regard to certain dates, but not so particular in regard to others, as appears in the course of his examination. He had never seen Mr. Duff before he went on to New York, in company with Mr. Wardell, with the view of making this contract. He had some former acquaintance with his name, but no personal acquaintance with the man.

When he and Wardell arrived at New York, they were taken into a large room, where they "somewhat timidly took seats." After sitting there for some time, a gentleman came in, whom the witness imagined to be John Duff; he asked if it was Mr. Duff, and said he desired to talk with him about coal and the Union Pacific Railroad. Duff replied in this exact language: "You are the eighth or ninth man that has been here to talk about coal on the Union Pacific. We propose to keep that ourselves." To this Godfrey replied, "I am here prepared to give you one-half of all that can be made out of it, and to pay all the bills."

If he intended to make a corrupt proposition to him, this

was rather a bold proposition to be made to a man whom he had never known, and whom he saw then for the first time, and to whom he had not been even introduced.

The witness then introduced Mr. Duff to his partner, Mr. Wardell. The talk between the parties did not exceed fifteen minutes in time, in all. In the course of the conversation Duff asked Wardell what it would cost to mine the coal on the line of the Union Pacific Railroad. His answer was, eight cents a bushel, but that there were other expenses to be taken into consideration. Duff then told them to come back in six or eight days, and he would talk with them about it. Witness and Wardell then left New York, and afterwards met in the city of Boston, where they prepared a contract which they proposed to submit to the Union Pacific Railroad Company. They returned to New York on the 15th of July, went to Mr. Duff's room, and presented him with a draft of the contract. During the interview that he had with Mr. Duff on this occasion, Wardell remained in an outer room. During that day, witness became acquainted with Dillon and Bushnell. During the conversation with Duff, he says that Duff remarked, "You can not have any half of this contract; you will be whittled down to one-tenth."

After the paper had been interlined and altered, in such a way as Duff intimated it would be signed, it was given back to the witness, and then he and Wardell went to have it copied off, which was done.

The next morning, the paper, as copied, was presented. Up to this time he had not seen Durant, or Oliver Ames.

On the 16th, he says, Duff and Bushnell both asked him how he proposed to operate, and he answered, by a joint stock company.

After the paper was presented, Duff took it into the other room, and did not return again until eleven o'clock. He put the paper on a desk, and began to talk about his interest, or their interest. Witness then remarked to him, "Mr. Duff, this means money." "Well," said he, "that

is all right." Mr. Wardell was then called in, and the paper was signed in the directors' room. It is not pretended that either Ames, Durant or Dillon, took any part in this conversation. Before leaving, the witness asked Duff in regard to his interest, and said to him, "We don't want to go away without authority to get money when we need it.". He then introduced the witness to Mr. Crain, who was the secretary of the Union Pacific Railroad, and told Crain, that our draft would be honored, and told him to draw on Crain for $21,750. Witness further says, that Duff got the amount, $21,750, from my statement; that five per cent. on the stock that would come to him, for the use of his associates, would be $21,750; that $65,000 was to come to Watson, Wardell and himself, the whole capital being $500,000. None of this conversation was in the presence of Mr. Wardell. Wardell and Godfrey, the witness, then returned to the West, and made preparations for commencing business of opening a coal mine.

Soon afterwards, and before there was any organization of the company, the witness became frightened at the expenditures, and applied to Wardell to buy him out. He did buy him out, and the witness made a transfer of all his interest to the Wyoming Coal Company, which transfer was afterwards changed, and made to Thomas Wardell, and purports to transfer to Wardell all his right and interest in, and to, a certain contract with the Union Pacific Railroad Company. This witness further states, that in the conversation with Duff, Duff said, that we could afford to take small interest, as the prices were liberal. "I object," says the witness, "to the interest being so small," and he made the remark, "that we got pay enough in all; that we could afford to take small interest." He further says, that it was understood, between Duff and himself, that we could organize a company with $500,000 stock; and that he stated further to Duff, that five per cent. would probably be all that would be wanted, before the profits of the concern would take care of it. He

further says, that the amount of stock stated was to go to Duff; but, how it was to be apportioned, he did not know.

Witness further stated that he sold out to Wardell on the 29th of September, 1868.

The witness further stated, that he could not say that Wardell knew that Duff, or any other director of the Union Pacific Railroad, was to have an interest in the contract, or that it was to be assigned to a corporation in which they were to be stockholders, at or before the time it was made.

Witness, when asked whether he had any explanation to make in regard to his testimony, stated that in the use of Mr. Duff's name, he did not design to use it individually, but for himself and associates—he having understood that nine-tenths of the stock was to come to him, and that he was acting "either for the *railroad company or the stockholders therein.*" And further he says, that his most important conversation with Mr. Duff was in an outer room, after they left the directors' room, and after the contract had been signed.

And further explains that in regard to the one-tenth interest, he did not fully understand that their interest must be brought down to one-tenth; that it meant one-tenth for both of us, but that he was afterwards enlightened through the making of the drafts that covered nine-tenths of the stock, less $15,000 to Watson (see page 245 of transcript). Witness further says on the same page, in answer to the question put to him by the attorney for the defendant, that he did not know whether Bushnell and Duff were acting for the railroad, or for the stockholders of the railroad.

On cross-examination, the witness was asked, "What did you mean when you told Duff 'this meant money?'" He answered that the parties or the road must furnish nine-tenths of the cash when called for by Wardell and himself. (p. 250.)

On cross-examination, witness was further asked this question: "I ask you now if you assumed at that time that Duff was negotiating for the interest in this contract and

the business of executing it for himself, and the other gentlemen for their private advantage and benefit?" (p. 252.) He answered, "I gave the matter at that time no thought; I am not sure I knew Mr. Duff to be a railroad director; I knew he was a land commissioner, and sought him simply for reasons stated in my previous testimony." He further says that, before the contract was signed, Duff did not tell him that he was to represent anybody in the ownership of the stock (p. 254). He further says that, before the contract was signed, Duff asked him for his plan of organization, and he stated to him that we had conferred somewhat about that, but had not definitely determined, but believed we could organize on the basis of $500,000, and pay a dividend out of it, and that was all that was said about the corporation before the contract was entered into.

This deposition of Cyrus O. Godfrey, to which we have referred, was taken at Omaha, Nebraska, in November, 1876.

The only other person who was actively instrumental in negotiating this contract with Godfrey, who made the interlineations and changes in the first draft of the contract, and who acted in the final agreement between the parties, was John Duff, one of the directors of the Union Pacific Railroad Company, and who says, he was requested by Oliver Ames and Thomas C. Durant, the then president and vice-president of that company, to agree upon the terms of the contract with Godfrey and Wardell. He is the only one with whom Godfrey pretends to have had any conversation in regard to the terms of the contract, and he says (see p. 167, of the printed transcript): that before the making of the contract referred to, he did not have any understanding or agreement with either Godfrey or Wardell; that he was to have an interest, either directly or indirectly in the said contract, or the profits that might arise therefrom, or the business of executing the same.

He further swears, that neither he nor any of the directors of the Union Pacific Railroad Company, to his knowl-

edge, either before or since, had any interest in that contract, or any right or promise to share in Wardell's, or Godfrey's and Wardell's profits, except such interest as they may have had by reason of being stockholders of said company.

Mr. Bushnell, in his deposition (p. 229, of the transcript), says that the negotiations which resulted in the execution of the written contract, were had between Duff and Ames on the one side, and Godfrey and Wardell on the other; that he was not present; that he merely introduced Mr. Godfrey and Mr. Wardell to Mr. Duff, and took no part in the negotiations. And in his sworn answer to the bill of complainant, in this case, he says (see p. 64, of the transcript): "It was understood and agreed that said contract was to be for the benefit of the Union Pacific Railroad Company." And that the subscription to the stock of the coal company, made by him, was so made for the use and benefit of the Union Pacific Railroad Company, and is now held in trust for the benefit of said company; and that he was not interested in the Wyoming Coal & Mining Company as a stockholder thereof, except in behalf of the Union Pacific Railroad Company.

Thomas C. Durant, in his deposition (p. 145, of the transcript), says;

"Previous to the time the contract was shown to me, on "the 16th of July, 1868, I had no conversation with either "Mr. Godfrey or Mr. Wardell; no promise express or im- "plied was ever made to me, and I never heard of "any promise directly or indirectly, before the contract "was made, by Godfrey or Wardell or either of them, to "give any director of the Union Pacific Railroad Company "any interest in the contract, or the profit arising from it, "or any benefits to be derived from it."

Oliver Ames, in his deposition (see p. 193, of the transcript), was asked these questions:

"Int. 4. State whether or not you participated in the "negotiations of the contract for the mining and delivery

"of coal, made between the Union Pacific Railroad Com-
"pany and Thomas Wardell and C. O. Godfrey, July 16,
"1868? If yea, give the history of the negotiations of
"that contract; when, where, by whom, and with whom it
"was negotiated, and everything within your recollection?

"Ans. I did not participate in the negotiations. I know
"that Mr. John Duff was the party that made the contract,
"Mr. Thomas C. Durant acting with him. I had nothing to
"do with it before the contract was finished.

"Int. 5. Whether or not, to your knowledge, was there
"any agreement or understanding between any officer, di-
"rector or agent of the railroad company and said Godfrey
"and Wardell, or either of them, by which any director,
"officer or agent of the railroad company was to share in
"the pecuniary benefits of said contract, either directly or
"indirectly, or by the organization of a corporation in
"which such directors, officers or agents, or any of them,
"were to become stockholders? If yea, state fully and in
"detail the substance and history of such arrangement?

"Ans. I don't know of any such contract, arrangement
"or understanding. I had no such agreement or under-
"standing, but as I did not make the contract, I knew
"nothing about any agreement."

Sidney Dillon in his deposition says (p. 233 of the transcript), he had nothing to do with the negotiations which resulted in the contract of the 16th of July, 1868, between the Union Pacific Railroad and Wardell and Godfrey.

He was then asked this question:

"'Int. 5. State whether or not to your knowledge there was any agreement or understanding between any officer, agent or director of the railroad company and the said Godfrey and Wardell, or either of them, by which any director, officer or agent of the railroad company was to share in the pecuniary benefits of said contract either directly or indirectly, or by the organization of a corporation in which such directors, officers or agents, or any of them, were to become

stockholders," he answers, "I have no personal knowledge of any such agreement or understanding."

Sidney Dillon was president of the railroad company at the time of the institution of this suit, and has always been a director of said company; so that all the parties who were implicated in this charge deny most emphatically that at the time of the execution of this contract they had any interest, or were to have any interest in its profits. Mr. Godfrey himself does not state positively that they were to have any such interest; but at one time he throws out hints that Duff and his associates were to have an interest in the contract, whilst at another time he states that his understanding was that this nine-tenths' interest, or nine-tenths of the stock of the coal company, was to be for the benefit of the Union Pacific Railroad Company. He says, at page 241, in answer to the question who was to take this stock under that arrangement: "I can only say it was to go to Mr. Duff—how it was to be apportioned I don't know" — that is, that the $450,000 of the stock should go to Duff; whereas at page 245 he says: "I want to state that in the use of Mr. Duff's name I did not design to use it individually, but for himself and associates, I having understood that nine-tenths of the stock was to go to him, and that he was acting either for the railroad company or the stockholders therein."

It is evident that Mr. Godfrey did not consider the interest a very valuable one; for he sold out his interest to Mr. Wardell a few months after the contract was made, though he does say that Mr. Duff was incensed at him for selling out his interest. (See page 242 of the transcript.) Why Mr. Duff should take such a deep concern in his welfare does not appear, and may exist only in the imagination of Mr. Godfrey, who is evidently disposed to be sensational and imaginative.

Much stress is laid upon the fact, that a company was organized called the "Wyoming Coal & Mining Company," and that the formation of this company was contemplated

about the time, or soon after the execution of the contract. The fact is, that the company was never regularly organized until the spring of 1869. But that Mr. Wardell intended to form such a company, for the purpose of carrying on the mining operations at a very early period, is clear. Indeed, Mr. Wardell says in his testimony, (p. 109), that from the begining, Godfrey and himself intended forming a corporation to execute the contract and carry on the business, and that the capital stock first contemplated was $65,000: that Godfrey was to have an interest equal to $25,000, Wardell $25,000, and William S. Watson to have an interest equal to $15,000. This accounts for the fact, that the accounts were kept by Godfrey in the name of the Wyoming Coal & Mining Company. All that Godfrey said in his testimony in regard to the formation of a corporation as connected with the contract, was that Duff and Bushnell, during the negotiations between Godfrey and Duff, asked him what their plans were; and he said that he and Wardell thought of organizing a corporation, that they had conferred somewhat about it, but had not definitely determined. He was asked the question: "State whether or not, at the time this contract was made, and before any steps were taken in execution of it, either by yourself or Wardell individually, or in the name of the Wyoming Coal Company, Wardell knew that Duff or any other director of the Union Pacific Railroad was to have any interest in this contract, and that it was to be assigned to a corporation in which they are to become stockholders?" and answered: "I cannot state that he did; we had previously talked of it, and both expected somebody to have an interest in it."

There is no doubt therefore, that both Wardell and Godfrey intended when they made this contract, to form a corporation for the purpose of carrying on the business under it, and if so, of course that the contract was to be assigned to the corporation. Mr Godfrey had stated, that this was the mode in which they had carried on their operations under other coal contracts in different parts of the country.

But that proves nothing, until it is shown that these directors as individuals, and for their individual benefit, agreed to become stockholders in such corporation before the execution of the contract.

The agreement to form a corporation beforehand, of itself, adds nothing to the unlawfulness of the contract, and the directors could just as well have had a secret understanding with Godfrey and Wardell, without the formation of a corporation, as with it.

The question after all is, was there any understanding that they should have an interest in the profits of the contract, and was this understanding had before the contract was executed? For if their individual interest in the contract did not exist until after the execution of the contract, their interest did not conflict with their duty to the company in the execution of it. They all say, and Mr. Godfrey says, in effect, that there was no such understanding; and they all say further, that when the company was afterwards formed, the stock that was taken in the individual names of the directors was taken for the benefit of the Union Pacific Railroad Company, and there is nothing in the testimony to show to the contrary.

The first meeting of the stockholders of the coal company was held on the 17th of February, 1869; at which two thousand shares of stock was voted, and five directors elected. The first meeting of the directors under that organization was held on the 17th of May, 1869, and then the board was regularly organized by the election of John Duff as president. At this meeting a resolution was passed, appointing John Duff, Oliver Ames, and C. S. Bushnell as a committee to apportion nine tenths of the stock of the company, *pro rata*, among the stockholders of the Union Pacific Railroad Company, provided that the directors of the Union Pacific Railroad, should take said stock within thirty days after notice given by the committee.

The passage of this resolution fixed the interest of nine

tenths of the stock of the coal company in the stockholders of the Union Pacific Railroad, *pro rata*.

It is argued that no notice was ever given by the committee under the resolution. But that fact did not affect the rights of the stockholders of the Union Pacific Railroad Company; their right to take the stock still remained and continued until thirty days after such notice was given; and if the notice never was given, the right yet remains to the stockholders, in accordance with the terms of that resolution.

At the same meeting of the board, a resolution was passed, accepting the transfer of the contract of Godfrey and Wardell to the Wyoming Coal & Mining Company.

What did Mr. Wardell know about these negotiations between Duff and Godfrey? Mr. Godfrey says (p. 242 of the transcript), "That Mr. Wardell and myself, up to the time of signing, had had little time for conference in New York, and I acted as the party negotiating. When it had been signed; and before we left New York, I explained to Mr. Wardell the conditions on which the contract had been taken, and that Mr. Duff would represent somebody or some proportion in the Wyoming Company;" and at page 239 of transcript, Godfrey states that after they arrived at the hotel at night Wardell said to him: Mr. Godfrey, you would not take less than one-third, anyhow; you might possibly be satisfied with a quarter, but had to come down to one-tenth. Now, what does Mr. Godfrey mean by explaining to Mr. Wardell the conditions on which the contract had been taken? Simply, of course, that he and Wardell were to have one-tenth interest and that somebody was to have the balance. Who that somebody was, is explained in another part of his testimony, by saying it was the Union Pacific Railroad Company, or the stockholders of the company. There is nothing in this to show that Mr. Wardell knew, from any information given him by Godfrey, that any of these parties, as individuals, were to have an interest in that contract. It may be that Wardell did not know,

or did not care to know, whether it was the railroad company, or the stockholders of the company. He had intended from the beginning, as he said, that the business should be carried on by a corporation, and hence he made no objection to the business being carried on in the name of a corporation, although in fact, up to February 7th, 1879, no corporation was in existence. Mr. Godfrey says (page 240), that he instructed Mr. Clark, the book-keeper, to take and make all vouchers in the name of the Wyoming Coal & Mining Company, and that his instructions were obeyed. There is nothing, therefore, in the statement of any of the witnesses, whose testimony thus far has been referred to, which showed, or tended to show, that Mr. Wardell knew that any of these directors were to have a personal interest in the benefits of that contract; and if it be true, as all of them say, that the nine-tenths interest was to belong to the Union Pacific Railroad Company, or its stockholders, then, there is nothing in the argument that the profits of the contract were exorbitant; for, if the company was to have 9-10ths of the profit, leaving only 1-10th to Wardell, his profits could not have been very large. It is true that Wardell, in his bill, claims that there was no understanding, or agreement, that the company should have this 9-10ths; but, that somebody should have the 9-10ths, and he only 1-10th, is clear throughout the whole testimony of the case, with this exception, that it does appear, in the testimony of Godfrey and others, that Wm. S. Watson was to have $15,000 of the stock, and was to be interested to that extent in the operations of the company; and the testimony further shows, that Mr. Wardell subsequently bought out Watson's interest, which,—if it be true, would make Wardell's interest in the whole concern, 65 5-100ths, instead of 50 5-100ths, or 1-10th; and this seems to have been admitted when the $21,750 was paid, which was five per cent. on $435,000. The evidence shows that Watson did pay his assessment of five per cent. on $15,000, or $750. It is admitted, that the testimony of all

the members of the executive committee was to the effect, that all they did in reference to this coal contract, was in the interest of the railroad company; but, it is claimed that this was an after-thought, born of the odium of the Credit Mobilier explosion; but it would be difficult for anyone to put his finger upon any portion of the testimony, which would give anyone of the members of the executive committee a legal claim to any portion of the profits of this coal contract, prior to the organization of the Wyoming Coal and Mining Company, in February, 1869, at which time they admitted that this 9-10ths interest belonged to the Union Pacific Railroad Company. As a matter of fact, it does not appear that any one of them received a dollar in money from the profits of that contract; or that they were credited individually with any money paid towards the prosecution of the enterprise; nor does it appear that the Credit Mobilier explosion, which has been alluded to, took place prior to February, 1869. The first draft that was drawn for $21,750, was drawn on the Union Pacific Railroad Company, and this was done, as Mr. Godfrey says, by the direction of Duff himself; but it is very clear that this draft was not drawn for the amount stated in pursuance of any arrangements made before the parties left New York. Mr. Durant in his testimony explains this matter; he says "that on the 16th day of July, 1868, he was shown the contract drawn up and signed;" he says, "I did not know that any such contract was in contemplation. I never heard the names of Wardell and Godfrey mentioned until I was shown the contract as drawn up. I objected to making such a contract unless the company were perfectly sure of the ability of the parties to carry it out, and I think I suggested that it ought to be modified in one or two particulars. I was informed by Mr. Duff, that the plaintiff and his associates were men of great experience in the mining of coal, and had large contracts for supplying coal on the Hannibal and St. Joseph Railroad in Missouri.

"It was very important that we should make arrangements to get a supply of coal on the Union Pacific Railroad, in order that we might get through the ensuing winter. Although we had sent men out in May to commence operations, they had not got out any large quantities. I also learned that the superintendent of the road had made a contract for 10,000 tons of coal at $7 or $7.50 per ton, and the coal would be taken from the out crop, and of course was not of the best quality. I did not object to the contract on account of the prices paid. My principal objection was the fear that they would not be able to give us a supply of the quantity of coal we wanted. I knew that it required a much larger outlay than was provided for in the sinking of shafts, in the putting up of machinery, and getting out the quantity of coal; therefore I let the matter drop until I could go West.

"I also suggested that, as the trustees were engaged in the construction of the road under the Ames contract, and were very much interested in having a supply of coal in order to keep their supply up, as they intended to work during the winter, for the present the trustees should advance to Mr. Wardell a sum of money, meaning the same specified in the contract, which should be the minimum sum, and that he might go on with the work, and then we would see what could be done in regard to the matter. After I had gone out and looked over the ground, I also suggested to them that they should provide some way, that, if Mr. Wardell did not go on lively with the work, they should give it into the hands of somebody that would push the matter, even if they lost on the first year's business.

"I also suggested that they keep the matter in such shape that, by the advance of this money to Wardell and Godfrey, if it was thought advisable and the Union Pacific Railroad Company desired to do so, they could get out the coal themselves. In answer to these suggestions, I was told that they thought they could arrange with Mr. Wardell so as to limit his interest in the contract, and at the same time have

a large enough interest in it to induce him to act as superintendent and take charge of the work, in case the company went on themselves. This conversation all occurred within an hour. I left on the 17th, the next day, for the line of the road, and for the purpose of looking over the coal and fuel matters, and ascertaining at what point on the road it was most desirable that we should have coal."

It was evidently in pursuance with this understanding that the money was advaneed to the contractors. Wardell testifies that in one month from the making of the contract he put into the business $36,000 of his own money, and during the fall he put in over $60,000.

Now let us look briefly over the history of these transactions:

The contract was made July 16, 1868. It purports to be made between Godfrey and Wardell, on the one side, and the Union Pacific Railroad Company on the other. It is claimed that secretly, and by a corrupt understanding between Wardell and Godfrey on the one part, and certain directors of the Union Pacific Railroad Company on the other, these other parties were to be interested to the extent of nine-tenths of its profits. The whole management of the business was put in the control of Godfrey and Wardell. The president of the railroad company writes a letter to the superintendent, informing him that Godfrey and Wardell had made the contract, and instructing all employees of the railroad company to afford them all the facilities they may call for in fulfilling the same. And yet, no security is taken from the contractors by these parties who are said to be interested in the contract, and no obligation, written or otherwise, appears to have been entered into, by which the profits were to be paid to them or any of them; nor does it appear, that they did at any time receive any of the profits.

Wardell went immediately to work in developing the mines, and expended during the first year $60,000 of his own money in the work. He commenced furnishing coal to the railroad company, as early as August, 1868, and

during the year 1868, he furnished to that company from the mines 8,755 tons; in the year 1869, 54,386 tons; in the year 1870, 88,315 tons; in 1871, 93,532 tons; in 1872, 116,622 tons; in 1873, 142,225 tons, and in 1874, before the seizure of the property, 18,000 tons; and to outside parties he furnished, during said period, 25,226 tons.

During a large portion of this time he received pay from the railroad company for coal delivered, which was expended in the opening of the mines, and the purchase of machinery and other improvements to the amount of $450,000.

In August, 1869, the company refused to pay or allow him more than $3.50 per ton for coal, and during the whole period of time subsequent to that date, he was only credited upon the books of the railroad company, at the price of $3.50 per ton for coal delivered.

Not only do none of these parties receive anything under the contract for themselves, but their whole action is in the interest of the railroad company; and as early as February, 1869, they declare that the railroad company is entitled to nine-tenths of the benefit of the contract. And now, the railroad company, after having reaped the benefit of the contract, in receiving coal under it for six years at their own prices, only a portion of which has been paid, seizes upon the whole property, and sets up the claim that Wardell is entitled to nothing under the contract, because their own agents and directors, who for six years had denied him his rights under the contract in the interest of the railroad company, had, as they say, a secret understanding that they individually were to derive a benefit under it. It looks very much as if the railroad company designed from the start to entice Wardell into the project for the purpose of having their coal lands developed, and that they only paid him so much as was necessary to a full development of the mining property, and then, under the pretense that the original contract was fraudulent, forcibly took the property out of his possession. They only paid him enough at the start to induce

him to go on with the work, and so soon as the mines were sufficiently developed, they reduced the price of coal, and even failed to pay what was due at the reduced prices. After the work of developing the mines was once commenced, they had ample security in their own hands for the fulfillment of the contract on the part of Mr. Wardell, for they could refuse to pay, as they did actually refuse to pay, the price agreed upon under the contract, and he could not suspend the work without sacrificing all that he had put into it.

JAMES O. BROADHEAD,

*Solicitor for Appellant.*

OFFICE SUPREME COURT U.S.
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IN THE

# Supreme Court of the United States.

No. 167.

THOMAS WARDELL,
APPELLANT,

*vs.*

THE UNION PACIFIC R.R. COMPANY ET AL.,
APPELLEE.

**Appeal from the Circuit Court of the United States for the District of Nebraska.**

# BRIEF AND ARGUMENT

FOR THE

RAILROAD COMPANY

BY

A. J. POPPLETON.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1880.

IN THE

# Supreme Court of the United States.

THOMAS WARDELL, APPELLANT,

*vs.*

UNION PACIFIC RAILROAD CO., ET AL.

**Appeal from the Circuit Court of the United States for the District of Nebraska.**

*Brief and Argument for the Railroad Company.*

## STATEMENT.

This is an action originally brought by Thomas Wardell, as plaintiff, against The Union Pacific Railroad Company, The Wyoming Coal and Mining Company of Nebraska, and John Duff, Thomas C. Durant, Charles A. Lombard, Sidney Dillon, C. S. Bushnell, Oliver Ames, James W. Davis, and Andrew J. Poppleton, alleged directors of the Wyoming Coal and Mining Company, and Oakes A. Ames and Oliver Ames, executors of Oakes Ames, deceased.

The substance of the bill is that Wardell, appellant, is either the owner of the entire contract, hereafter set out in full, and the property accumulated by, and the moneys due

to the Wyoming Coal and Mining Company, under it or a stockholder in said Coal Company; that the individual defendants have conspired to deprive him of his interest therein; that the Coal Company has refused after demand made by him to assert its rights in respect to said contract by bringing suit against the other defendants, whereby he becomes entitled to institute this action in his own name. The prayer of the bill is for an account of the moneys due on the contract and of the property accumulated under it, of the damages accruing from the abrogation of the contract, as hereinafter stated, and a decree against the railroad company, Dillon, Duff, Bushnell, and Oliver Ames, for the amount found due.

The answer of the Railroad Company alleges in substance the following defenses:

I.

That when the contract of July 16, 1868, was made, it was agreed and understood between Wardell and Godfrey on the one hand, and Durant, Duff, Ames, Dillon, and Bushnell, officers and directors of the Union Pacific Railroad Company, on the other, that a corporation was to be organized for the execution of said contract; that the contract was to be assigned to said corporation; that said officers and directors of the Union Pacific were to become subscribers to the capital stock of the Coal Company and owners of a large interest therein; that the whole arrangement was a device by which Durant and his associates expected and intended to enrich themselves at the expense of the stockholders of the Union Pacific Railroad Company, whose agents and trustees they were; that the terms and conditions of the contract were adjusted accordingly, and that the contract was therefore void; that Wardell knew all these facts, and was a party to the fraud, and has therefore no standing in a court of equity, and cannot recover.

II.

That if the contract and proceedings growing out of it should be held valid, in that case the interest of Wardell is that of a shareholder in the Wyoming Coal and Mining Company to the extent of one-tenth of the capital stock only, the other subscriptions being for the benefit of the Union Pacific Railroad Company, and that he is not entitled to maintain this action in that character, viz., as a stockholder of the Wyoming Coal and Mining Company.

III.

That the Union Pacific Railroad Company and Wyoming Coal and Mining Company, by reason of the contentions and differences growing out of the contract of July 16, 1868, on the 30th of September, 1875, agreed upon an adjustment of the matters in controversy, whereby the Railroad Company paid the Coal Company one million dollars in satisfaction of its claims, and the contract was cancelled. This settlement has been executed, payment made to the Coal Company, and the proper proportion of such payment, viz., $100,000, tendered to Wardell.

The contract, out of which the suit grows, by reason of its importance, is here given in full.

Contract of July 16, 1868, between Thomas Wardell and C. O. Godfrey, of the first part, and the Union Pacific Railroad Company of the second part:

(Copy.)

"This agreement, made this 16th day of July, in the year "of our Lord one thousand eight hundred and sixty-eight, be- "tween the Union Pacific Railroad Company, by its proper "officers, of the first part, and Cyrus O. Godfrey and Thomas "Wardell, of the State of Missouri, or assigns, parties of the "second part, witnesseth: That the said party of the first part "agrees that the said party of the second part may prospect at

" their own expense for coal on the whole line of the Union
" Pacific Railroad and its branches and extensions, and open
" and operate any mines discovered, at their own expense; that
" said Railroad Company agrees to purchase of said parties of
" the second part all clean merchantable coal mined along its
" road needed for engines, depots, shops, and other purposes
" of the company, and to pay for the same, the first two
" years, at the rate of sixty dollars per ton, for the next three
" years, at five dollars per ton, for the four years thereafter
" at four dollars per ton, and for the six remaining years at
" the rate of three dollars per ton, delivered upon the cars
" at the mines of the said party of the second part, and which
" shall not be less than ten per cent. added to the cost of the
" same to the said party of the second part. This contract
" to be and remain in full force and effect for the full term
" of fifteen years from the date hereof. The said Railroad
" Company agrees to facilitate the operations of the said
" parties of the second part, in prospecting and otherwise,
" by means of such information as it may possess, and by
" furnishing free passes on its road to the agents of the
" parties of the second part, not exceeding six in number.
" Said Railroad Company further agrees to put in switches
" and the necessary side-tracks at such points as may be
" mutually agreed upon for the accommodation of the busi-
" ness of the said parties of the second part; that the par-
" ties of the second part agree to make all necessary exer-
" tions to increase the demand and consumption of coal by
" outside parties along the line of said railroad, and to open
" and operate mines at such points where coal may be dis-
" covered as may be desired by said Railroad Company, and
" to expend within the first five years from the date of this
" agreement in the purchase and development of mines and
" mining lands and in improvements for the opening, suc-
" cessful, and economical working of the same, not less than
" the sum of twenty thousand dollars; also to furnish for
" the use of said Railroad Company good merchantable coal,
" and to pay all expenses for improvements for loading coal
" into cars. Any improvement desired by said Railroad
" Company in regard to the coal to be used by it shall be
" at the cost of said Railroad Company. In consideration
" of their exertions to increase the demand for coal and the

"large sum to be expended in improvement, it is further "agreed that the party of the second part shall have the "right to transport over the said railroad and its branches, "for the next fifteen years from the date of this agreement, "coal for general consumption at the same freight that will "be charged to others; but the said party of the second "part shall be entitled, in consideration of services to be "rendered as herein provided, to a drawback of twenty-five "per cent. on all sums charged for transportation of coal.

and the Government. (Rec., fol. 249.) The Wyoming Coal and Mining Company, so organized, continued to execute this contract, notwithstanding frequent but ineffectual efforts of the Government directors of the Union Pacific to have it disavowed, until the Credit Mobilier power had ceased to rule the company, in March, 1874, and its control passed into other hands. From the commencement and up to this date, Duff had been president of the Coal Company, Wardell its secretary, treasurer, and manager, and Ames, Duff, Bushnell, and Wardell, directors.

In March, 1874, the general superintendent of the Union Pacific Railroad Company, by the direction of its board of directors, in consequence of threats made by Wardell to take possession of the mines and stop the supply of coal to the Union Pacific Company, took possession of all the mines, property, and books of the Coal Company, and the Railroad Company has since refused to recognize the contract or the right of the Wyoming Coal and Mining Company to execute the same. Hence this suit.

FIRST.

The contract of July 16, 1868, is shown by express proof and by its terms to be void, or at least voidable, and cannot be enforced in equity at the suit of a party thereto, especially when he has entered into the contract with knowledge of its

The execution of the contract was entered upon as early as August, 1868, and though no such organization was then in existence, in the name of the Wyoming Coal and Mining Company of Nebraska, a corporation organized under the laws of the State of Nebraska. (See Testimony of D. O. Clark, bookkeeper, Rec., fol. 627.) On the 27th day of January, 1869, said corporation was organized by the filing of articles of incorporation, as required by law. (Rec. fol. 14.)

" the rate of three dollars per ton, delivered upon the cars
" at the mines of the said party of the second part, and which
" shall not be less than ten per cent. added to the cost of the
" same to the said party of the second part. This contract
" to be and remain in full force and effect for the full term
" of fifteen years from the date hereof. The said Railroad
" Company agrees to facilitate the operations of the said
" parties of the second part, in prospecting and otherwise,
" by means of such information as it may possess, and by
" furnishing free passes on its road to the agents of the
" parties of the second part, not exceeding six in number.
" Said Railroad Company further agrees to put in switches
" and the necessary side-tracks at such points as may be
" mutually agreed upon for the accommodation of the busi-
" ness of the said parties of the second part; that the par-
" ties of the second part agree to make all necessary exer-
" tions to increase the demand and consumption of coal by
" outside parties along the line of said railroad, and to open
" and operate mines at such points where coal may be dis-
" covered as may be desired by said Railroad Company, and
" to expend within the first five years from the date of this
" agreement in the purchase and development of mines and
" mining lands and in improvements for the opening, suc-
" cessful, and economical working of the same, not less than
" the sum of twenty thousand dollars; also to furnish for
" the use of said Railroad Company good merchantable coal,
" and to pay all expenses for improvements for loading coal
" into cars. Any improvement desired by said Railroad
" Company in regard to the coal to be used by it shall be
" at the cost of said Railroad Company. In consideration
" of their exertions to increase the demand for coal and the

powers of the board were vested when it was not in session. (Rec., fol. 663, 462, 452.) These men held controlling influence in the management of the Union Pacific corporation. Five of them—Ames, Durant, Duff, Dillon, and Bushnell—were the same parties who, as trustees in the triparte agreement between the Credit Mobilier, the seven trustees, and Oakes Ames, had absorbed the enormous profits of construction of the Union Pacific at the expense of its stockholders and the Government. (Rec., fol. 249.) The Wyoming Coal and Mining Company, so organized, continued to execute this contract, notwithstanding frequent but ineffectual efforts of the Government directors of the Union Pacific to have it disavowed, until the Credit Mobilier power had ceased to rule the company, in March, 1874, and its control passed into other hands. From the commencement and up to this date, Duff had been president of the Coal Company, Wardell its secretary, treasurer, and manager, and Ames, Duff, Bushnell, and Wardell, directors.

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FIRST.

The contract of July 16, 1868, is shown by express proof and by its terms to be void, or at least voidable, and cannot be enforced in equity at the suit of a party thereto, especially when he has entered into the contract with knowledge of its

fraudulent character, and entered upon its execution and continued to execute it in aid of the fraudulent design.

The directors of a corporation occupy the relation of agents and trustees of the stockholders.

Drury *vs.* Cross, 7 Wallace, 303.
Railroad Company *vs.* Howard, 7 Wallace, 392.
Jackson *vs.* Luderling, 21 Wallace, 616.
Koehler *vs.* Black R. Falls & Co., 2 Black, 717.

The better rule seems to be that agents and trustees cannot act for themselves and their principals, and *cestuis que trust* in the same transaction at all, such acts being held, on grounds of public policy, absolutely void.

People *vs.* Overseers, 11 Mich., 222.
F. P. and M. R. W. *vs.* Drury, 14 Mich., 288.
McGeiger *vs.* McGeiger, 14 Iowa, 328.
Clark *vs.* Lee, 14 Iowa, 425.
Michoud *et al. vs.* Girod *et al.*, 4 How., 503.

The most unfavorable statement of the law which can be urged in the case at bar is that found in Twin Lick Oil Company *vs.* Marberry, (1 Otto, p. 588,) viz., that a contract by a director with his corporation, though not absolutely void, "is "viewed with jealousy by the courts, and may be set aside "on slight grounds." But the cases cited in support seem to go farther than this.

Drury *vs.* Cross, 7 Wall., 299.
Moehler *vs.* Black R., 2 Black, 715.

Tested by the more stringent rule, no argument is needed to show the contract void from the beginning. And it seems equally plain that it must be avoided if tried by the more liberal test.

There can be no dispute that six of the officers and directors of the Railroad Company, Duff, Dillon, Durant, Ames,

Bushnell and Lombard, all of whom, except Lombard, are proved to have been concerned in the making of the contract, became stockholders in the Wyoming Coal and Mining Company. It is true that three of these have since disavowed a personal interest, but this was only after the pressure became too strong to make it entirely pleasant to assert an individual claim. These were not only directors of the Railroad Company but constituted the executive committee (the power behind the throne,) in whom the powers of the directory was vested, and who really controlled and managed the company.

Duff, Ames, and Bushnell constituted a majority of the board of directors of the Wyoming Coal and Mining Company, and together with the other three stockholders, Durant, Dillon and Lombard, substantially controlled the Union Pacific Railroad Company.

These were the same men who had profited by the Credit Mobilier contracts. They constituted a majority of the seven trustees who manipulated the Hoxie, Oakes Ames, and Davis contracts to the loss of millions by the Government, as has been claimed. These contracts are in evidence in this suit.

Rec., fol. 249.

The fact that the contract was executed by a corporation of which these parties were shareholders does not change the character of the transaction.

At the making of the contract it was distinctly agreed and understood that they were individually to have an interest in it, and that such interest was to be secured through the device of a corporation, to which the contract was to be assigned without consideration.

See testimony of Godfrey, Rec., fol. 521.

I.

The preponderance of direct proof on this point leaves no room for doubt.

*a*. The contract, notwithstanding its vast scope and importance, was never brought before the board of directors or the executive committee for consideration or action. It was never reported to the board or executive committee for ratification or rejection. Its execution was never formally authorized by a vote of either body, and no official record was ever made of the transaction. This, in a contract which affected the interests of the company to the extent of millions, is most extraordinary. So far as the records show, the signing of the contract was a private matter, and done by the president of the company on his own motion.

The claim first set up that the stock of the Coal Company was to be divided among the shareholders of the Railroad Company, according to their interest, is evidently a mere pretence. No distribution was ever proposed or made, and the claim that the subscription to the stock of the Coal Company made by the individual members of the executive committee and board of directors, whose names we found thereon, is evidently an afterthought, struck out when public attention had been challenged to the contract and its indefensible and fraudulent character set forth by the Government directors of the Railroad Company and others. The truth is, it was a device of the managing officials of the Railroad Company to entrench themselves individually in the wrongful possession of the fruits of the contract. The same device had been resorted to in the Credit Mobilier with complete success.

*b*. The testimony of Godfrey, who in conversation with Wardell negotiated the contract, is conclusive of its sinister and fraudulent character.

See testimony of Godfrey, Rec., fol. 234.

He swears positively that it was made upon a distinct agreement that it should be assigned to a corporation to be organized in the future to execute it; that Duff and his associates were to be shareholders in that corporation individually, which was to be managed by Godfrey and Wardell; and that the prices to be paid for coal by the Railroad Company under the contract were put at the indefensible figure named at the suggestion, not of Godfrey and Wardell, but of Duff; that pending the organization of the corporation, and months before the Wyoming Coal Company had any existence, the business was transacted and the books kept in its name, and that Wardell knew all these facts before the contract was signed and before its execution was entered upon.

For convenience of reference, a considerable portion of Godfrey's testimony bearing directly upon the negotiation and inception of the contract is here inserted. After testifying that he is forty-three years of age, engaged in coal mining and the management of coal mines, and resides at Hannibal, Missouri, he, among other things, says:

Q. When and where did you become acquainted with Mr. Wardell?

A. In the year 1862, at Bevier, Missouri.

Q. Give an account of your acquaintance with him, and business relations to him up to the year 1868, if you had any?

A. We became partners soon after my introduction to him, and continued as such until we organized The Central Coal Company, when Mr. Wardell became one of the chief stockholders, and he managed the mining interest, I the financial accounts, collections, payments, and contracts.

Q. State whether you ever had any business connections with him in any contract, or contracts, for delivery of coal to the Union Pacific Railroad Company?

A. I did have.

Q. More than one?

A. Only one.

Q. State, if you know, whether that is the contract out of which this litigation grows?

A. I suppose it to be.

Q. Give its date and identify it?

A. The date of the contract that I entered into in connection with Mr. Wardell, is July, 1868; dated July 16th.

Q. State whether you were interested in any other contract?

A. I never had any interest in any other contract in connection with the Union Pacific Railroad. As president of the Union Coal Company, I may have contracted to supply them with one hundred or two hundred cars of coal, but that was for a limited amount of coal. Since I have known of the intention to take my deposition, I have taken time to study the telegrams and books in my possession, that I might give it connectedly and thoroughly, and whatever I say I will undertake to give in that way. Up to this time, for several years preceding 1868, as previously stated, Mr. Wardell and myself had been connected in the coal business. His legitimate part of the work was the care and operation of the mines; my legitimate part was the care of accounts, making contracts, collections, and payment of bills. In the operation of the Central Coal Company Wardell had possessed himself of one-third of the stock; I had possibly a little less. It became apparent to both himself and me that the coal business was in its infancy, just beginning, and very few appreciated the extent to which it would reach. In view of this we discussed the extension and a line of development elsewhere. Mr. Wardell and W. S. Watson, both living at Bevier, Missouri, took a trip over the Union Pacific Railroad.

Mr. Woolworth. Fix that date as near as you can.

The Witness. That was the latter part of May, 1868, or June, 1868, I am not positive. It was very soon before going to New York. When Mr. Wardell returned from that trip he came soon after to Hannibal with a Mr. Richardson, Joseph Richardson, then of the Union Pacific, and introduced him to me as one interested in the Union Pacific, and one who would introduce us to the New York Board. This was early in July, 1868. On the 5th of July, or thereabouts, we started for New York, Mr. Wardell and myself, and arrived there on the evening of the 8th or the morning of the 9th of July. We went to the general offices of the

Union Pacific Railroad Company, at 20 Nassau street, expecting there to meet this Mr. Joseph Richardson, who was to introduce us. I had some former acquaintance with the name of John Duff, but no personal acquaintance with the man. My partner in the real estate business had been Joseph Hunt, president of the First National Bank of Hannibal, of which I was a director. Through Mr. Hunt Mr. John Duff had sent a list of lands he owned in Northern Missouri, to pay taxes on them, ten or twelve pieces of land. The name of our firm was Hunt, Godfrey & Co. Hence, when I went to New York I had relied somewhat upon that experience to make myself known to Mr. Duff. I also relied upon Mr. Sidney Bartlett and others in Boston. I had previously asked Jas. F. Joy for a letter of introduction to Union Pacific people, and I had such a letter; the date of it I have forgotten. We went into the large room, which I judge was used as a bank or fiscal agency, there being counters and desks similar to a bank. We somewhat timidly took seats, waiting and hoping to meet Mr. Richardson. He, failing to come, however, after our sitting there quite a length of time, a gentleman came in that I imagined to be John Duff. I had seen him years before when he was a contractor of the Hannibal & St. Joseph Railroad. I asked him if it was Mr. Duff, and told him I was of the firm of Hunt, Godfrey & Co., of Hannibal, and desired to talk with him about coal on the Union Pacific Railroad. He replied in the exact language: "You are the eighth or ninth man that has been here to talk about coal on the Union Pacific. We propose to keep that ourselves." I said to him in answer: "I am here prepared to give you one-half of all that can be made out of it, and to pay all the bills." His reply was: "Have you been there?" I said: "I have not, but my partner has." I then introduced Mr. Wardell, who had remained at a distance perhaps of fifteen feet from us during the previous conversation. Mr. Wardell came forward, and Mr. Duff then asked him in regard to the coal measures on the Union Pacific Railroad. He told Mr. Duff that he had been there; that there was something like nine feet of coal, and gave a brief account of his understanding of the coal in that field. When asked by Mr. Duff what it would cost to mine it and put it on the car, Mr. Wardell said about eight

cents, but that there were other expenses, and that it was a bad place to operate, being so far from the States. We were standing together in the centre of the room in front of the large door, I should suppose not to exceed fifteen minutes in all. After some further conversation, Mr. Duff said: "Come back in six or eight days and we will talk with you." No one else was present at that time or took part in the conversation.

Mr. Woolworth. Are you testifying from full notes of what you propose to say?

The Witness. No, sir; do you refer to this paper? I prepared notes from reading the testimony of other people, and from books, telegrams, and papers in my possession. It has been my habit, most always, to put perhaps three or four words down of what I wish to remember. My memorandum book will show that; as perhaps Mr. Wardell will remember, it was a method with me. I did this with a view to getting what I have to say connected.

Mr. Poppleton. I understand you to say that you are not reading from a statement, but testifying from memoranda?

The Witness. I am only watching that I may not get one part before the other.

Mr. Poppleton. You said that Mr. Wardell stated that the cost of mining coal would be eight cents per bushel; state what that would be per ton?

The Witness. It would be two dollars per ton. I connected with it a statement that there would be other expenses. After this interview Mr. Wardell and myself retired, and I think we took the train that night for Philadelphia, staying at my brother's house through the night and returning next day, and returning through New York, he going to Newport and I to Taunton, Mass., the understanding being that we would meet in Boston early the next week, and there prepare a paper, which would be handed to these parties for their consideration in the form of a contract. We met in Boston at the office of Chester I. Reed, then an attorney, afterwards one of the Governor's staff, and since died. He was an old friend of mine from Taunton. There we prepared a contract with such considerations as we were willing to insert. Hoping to get it signed, we returned to New York, July 15th, and went to the office of the Union

Pacific Railroad with the paper that we had prepared jointly. I carried it into Duff's room, which was the inner room of three rooms. I suppose all you gentlemen know those rooms; they were something smaller than these rooms. One was Dillon's, and one was Durant's; the inner room was Mr. Duff's. He was then land commissioner. I am not sure where Mr. Wardell remained during the morning interview, but am under the impression that he remained in the outer room. The paper that I presented was interlined considerably by Mr. Duff, taken by him, and shown to others. During this morning I was introduced to Mr. Bushnell, and I think I met Mr. Dillon. I introduced myself to Mr. Dillon. I had been told by Mr. Hunt that Mr. Dillon had formerly been rod-man for him. My partner had mentioned that if I should see Mr. Dillon I should call his attention to their former acquaintance in the field. Most of this day was spent in the rooms of the company, the greater part of it by myself in Mr. Duff's room. By previous understanding Mr. Wardell had left to me that department of the coal business, contracting and figuring with railroad men. That was one reason for leaving him outside, which might otherwise seem discourteous. Mr. Duff turned to me and said: "You cannot have any half of this contract; you will be whittled down to a tenth." At that time my impression was that he meant a tenth for me and a tenth for Wardell. After the paper had been interlined and fixed, as Mr. Duff intimated it would be signed, it was given to me, and Mr. Wardell and myself went to hunt a copyist who was also a notary. He had an office on Nassau street, a little lower down, in the third or fourth story of a building. The next morning, which was the 16th, we presented the paper prepared as they had intended. I think not in duplicate. Up to this time I had never met Oliver Ames. I may have seen Dr. Durant, but I don't remember to have seen him up to this day. Mr. Dillon. Mr. Bushnell, Mr. Duff, and other prominent men have always been in my mind in connection with the contract. That morning, the 16th, while in the room with John Duff, he asked me the question how much money it would take to operate this, and I told him not more than twenty-five thousand dollars. You will observe that he had put in the contract the stipulation that we should not spend

less than twenty thousand (20,000) dollars. I am under the impression that the amount of money was spoken of the first day. I know it was on the second, on the 16th. Mr. Duff and Bushnell both asked me how we proposed to operate. I replied, "By a joint-stock company," and I showed him blanks we were using in the Central Company, certificates of stock, cash accounts, blanks, and monthly statements, with several other blanks, which I was in the habit of carrying fastened together. I carried such blanks with me for years in my satchel, only as evidence of the completeness of our business methods. The amount of twenty-five thousand dollars that would be needed to develop the work was guessed at by me. I only estimated it from a general idea that I got from the kind of work that Wardell reported. I don't remember that the cash requirements had been discussed between Wardell and myself. After the paper had been presented to Mr. Duff he took it into the other room, and left me sitting in his room half an hour, and while he was out I figured on an old envelope the matter of money, and what amount would be in my judgment best to say to him about money. That envelope I tore up and threw in the basket before he came back again. When he came back I suppose it was not far from 11 o'clock; it was getting towards noon. He put the paper down on the desk, which desk was perhaps about the size of this, and, sitting with his back turned towards the room, he then began to talk about his interest or their interest. I won't be sure whether he said "ours" or "mine." I said to him: "Mr. Duff, this means money." That is the language I used. "Well," said he, "that is all right." The paper was then signed in the directors' room. Mr. Wardell, as I remember, having been called in. Mr. Ames, as I remember, was sitting at the head of the table. There were present Ames, Duff, Dillon, Wardell, and myself, and possibly others. I only judge from the other testimony that I have read that Dr. Durant was present. I presume he was, from the fact that they all testify to it. I don't remember it. The paper was signed by Mr. Ames. Then Mr. Duff told me to sign it, which I did, and Mr. Wardell followed. I then was very anxious with regard to the validity of the contract signed only by one person on the part of the Union Pacific Railroad Company, and I asked that the seal of the company be put on it.

Some one replied, I don't know who it was, "There is wax; there is no objection to it." It was put on. Whether Mr. Wardell or myself took the contract, I don't remember. We had a whispered conversation, Wardell and I, in regard to some authority for him to bring to Omaha in the form of a letter. He asked for it, and Mr. Ames wrote it. The language of that letter I do not remember, but it was addressed to Mr. Snyder, simply saying that a contract had been executed, and that we were the proper parties to supply coal. After this I think there was considerable conversation with various parties who asked questions in regard to the coal business. We then started and went to the outer room, Mr. Duff following, and when in the outer room Mr. Duff either had or then took the paper from one of us and put it in the vault. I was indisposed to let it go out of our hands and asked a copy. Mr. Duff replied that he was the ~~Lord~~ Commissioner, and the proper custodian for all such papers. I regarded the letter as confirming the contract, and hence I felt that there was little doubt that we could consider them bound by it. When we were in the outer room, I then talked to Mr. Duff in regard to this interest and money, and referred to a former conversation and said to him: "We don't want to go away without authority to get money when we need it." He then introduced me to H. C. Crane, who occupied a desk or a sort of cupboard in the corner of the room, a little arrangement shut off from any one else. I understood he was secretary of the Union Pacific Railroad Company and custodian of the contractors' papers and effects. He said to Mr. Crane that our draft would be honored, and turning to me, told me to draw on Mr. Crane for $21,750. How he got the $21,750 was from my statement that that was five per cent. on the stock that would go to him for the use of his associates with himself, $21,750 being five per cent. of $435,000 of the $500,000 that was supposed to be the stock of the company; $65,000 was to go to Wardell, Watson, and myself. I had some little difficulty in making that more than $50,000, but it was finally conceded, it being understood that if there was any difficulty about it Mr. Wardell and myself would arrange with Mr. Watson. It is proper here to state that very much of this conversation was not in the presence of Mr. Wardell. It was when he was in the outer room sep-

arated from me. I had never been in the habit of going into details with him. He had invariably accepted what I had done in such matters. We then went to the Fifth Avenue in a coupee that we found not far from the office. We were both of us pretty tired with excitement and effort, and we rode up to the hotel. That evening I am not sure we spent at home, but I am under the impression that we both retired early, occupying a double room. We were both of us impressed with a feeling that we had got a good thing, and that we were entitled to it on account of the risk, and on account of the quantity, and on account of the prices they were previously paying for coal. That night, after the gas had been turned out and we were both in bed, Mr. Wardell made the remark, "Well, Godfrey, you would not take less than a third anyhow, you might possibly be satisfied with a quarter, but had to come down to a tenth." We both laughed over it, and next morning started west. Previous to our going home, I think we telegraphed that men and material might be ready to start immediately for the mountains. Upon my return home, Mr. Wardell and myself made the draft provided for, it being my draft, number 260. If you desire I will cut this stub out and file it with the examiner. It is draft No. 260, made by myself and Thomas Wardell, July 23, 1868, on H. C. Crane, Secretary of the Union Pacific Railroad, in favor of the First National Bank of Hannibal, it being a sight draft. It was sent forward by W. T. Jackson, then cashier of the First National Bank, and was placed to my credit. I credited it on my books to T. Wardell on account of Wyoming; the bank crediting it to C. O. Godfrey. This draft went forward and was protested for non-payment. Mr. Seaman, cashier of the New York bank to whom it was sent, telegraphed Jackson, cashier of the First National Bank, that Godfrey's twenty-one thousand dollar draft was under protest, and it was sent back by the mails. Before it reached Hannibal the bank received a dispatch saying it would be paid. It was sent directly back and paid. This money was paid out on Mr. Wardell's drafts on me, as shown by statement which he presents in his direct testimony, which I have taken from his own book.

Mr. Poppleton. State in this same connection whether you made those entries?

A. I did not. I directed them to be made.

Mr. Woolworth. That is a copy of balance sheet?

A. Yes, sir; it is the same, letter for letter, as Mr. Wardell filed as one of his exhibits. It is from my individual books, you understand. This amount of money stood on my individual books to the credit of Thomas Wardell, on my bank account to the credit of C. O. Godfrey. About the same time, or soon thereafter, Mr. D. O. Clark, who had been my bookkeeper, was sent to Omaha to open the books for the Wyoming Coal and Mining Company. To him I sent this statement I have referred to, with instructions to credit the $21,750 to stockholders of the Wyoming Coal and Mining Company, and as soon as I could learn the names to whom it was to be apportioned, I would report to him. Hence he left under that entry ten or twelve lines blank in which to enter the names. I had at this time put into the concern $1,250, which was my per cent. on $25,000. Mr. Wardell had done the same, and Mr. Watson had paid $750, his five per cent. on $15,000. I furnished through the Central Coal Company considerable stationery and blanks, similar to those used in our corporation there. I instructed Mr. Clark to take and make all vouchers in the name of the Wyoming Coal and Mining Company, and this was always done up to the time when I retired from it, and, I understand, ever since. About this time, or soon after, Mr. Clark came to Omaha. Through Mr. Clark I had a letter asking me to send a form for the organization of a corporate company. Thinking that perhaps it was best to organize under the Missouri law, I sent a copy something similar to the Central Coal Company organization. Either verbally or otherwise I got word from Mr. Wardell that it would not do to organize under the Missouri law, and soon thereafter I began to be frightened at the expenditures, and I applied to Mr. Wardell to buy me out. He did buy me out, and I made a transfer in conformity with it of all my interest to the Wyoming Coal and Mining Company. Whether advised or otherwise, he saw what I did, that such transfer would not give him the right to get the stock that would otherwise be assigned to me. Hence I made another paper, a copy of which I have here, it being part and parcel of the former. I have it here. It is signed by Wardell and myself, and

it has a clause stating that it is part and parcel of the one previously made to the Wyoming Coal and Mining Company. [Witness reads the paper.]

Q. Is that Wardell's signature?

A. It is a copy.

The paper is offered in evidence and is hereby annexed, marked exhibit "A." Counsel for plaintiff objects to receiving the paper in evidence on the ground that it is a copy and not the best evidence.

The Witness. From that time forward my connection with the company ceased. I had no further interest in its management except as indirectly I could befriend Mr. Wardell. Some time thereafter I received two letters from C. W. Mead, asking me if I would take hold of the coal interest of the Union Pacific. He was assistant general manager under Hammond. I replied to both, that I would not; that my relations with Mr. Wardell were such that I could not. I had sold out to Wardell, and my desire was to protect him. His next letter was a desire that I should send some one, he having in mind Mr. Bunker. I replied I could not have anything to do with it. He said afterwards in conversation that he hoped that I would have sent him Mr. Bunker.

On April 9th, 1869, I wrote a letter to Mr. Duff, requesting every facility possible for Mr. Wardell to carry out his contract.

Counsel for the plaintiff objects to witness stating the contents of any paper.

Mr. Poppleton. At the time of your conversation with Mr. Duff in respect of this contract—the terms of this contract—in New York, state exactly what occurred as to the conditions of this contract, the parties to it, who were interested, and how it was to be executed? Give the details of that conversation as far as you can.

A. I attempted in my explanation to give that quite fully. I had four interviews with Mr. Duff. I cannot state at which one these things were said. I know that in the inner room we talked about prices, the prices that we had given him jointly, having in mind the highest prices that we could possibly get, which was six dollars for two years, five for three years, four dollars for several years, and three for the rest; I cannot remember exactly the number of years for

each. While talking to Mr. Duff about the prices, at one time he made the remark that prices did not make much difference; they were paying nine dollars, our bid was six dollars. I was impressed with the idea that it was very much cheaper, and yet Mr. Wardell and myself felt that it was liberal prices.

Mr. Poppleton. State what Duff said, if any thing, as a reason why you should take a small interest in the contract?

A. I cannot give his language, but he stated that we could afford to take a small interest, as the prices were liberal. That was the substance of it. I may be able to refresh my mind with regard to the words.

Q. Did he use language to this effect; state whether or not he did; that it did not make any difference, that your interest was one-tenth, if the prices were enough to give you substantially the same, you would get with bigger interest and less prices; if he did not, state what he did say?

The counsel for the plaintiff objects that the question is leading, and is cross-examination of defendant's own witness.

The Witness. I think it was on the second day when I was in his room and carried the contract ready for signature, that I objected to the interest being so small, and he made the remark that we got pay enough anyhow; that we could afford to take a small interest.

Q. State what, if anything, passed between you and Duff, or any of these directors of the Union Pacific Railroad in respect to the formation of a corporation to which this contract was to be assigned, and which should execute it?

A. It was understood by Mr. Duff and myself that we should organize a company with five hundred thousand stock, and they have four hundred and fifty thousand. I stated to him that five per cent. would probably be all that we would want before the profits of the concern would take care of it.

Q. Who was to take this stock under that arrangement?

A. I can only say it was to go to Mr. Duff—how it was to be apportioned I don't know. Hence my instructions to Mr. Clark to leave room and I would send him names as soon as I knew them.

Q. State whether or not any name was suggested as the name of the corporation?

A. I think that was agreed upon between Mr. Wardell and myself afterwards, after we left New York.

Q. Before or after the drawing of this $21,750 draft?

A. I should judge before that, because we came directly West, and I opened the account on my books with the Wyoming before drawing the draft.

Q. Please hand to the examiner the account you exhibited—a memorandum?

(Counsel for plaintiff objects to the exhibits offered on the ground that they are copies.)

(The account last above mentioned on two sheets is hereto attached and marked Exhibit "B.")

Q. State whether the originals are in your possession?

A. They are not; they were forwarded to Mr. Clark, Mr. Wardell's clerk. These are copies of papers I sent. I sent several statements to Mr. Clark; these are statements of the receipt and expenditure of that $21,750.

Q. Can you give the date when you sold out to Mr. Wardell?

A. I think the 29th of September, 1868. Perhaps the gentleman can tell me if I am wrong.

Q. State in these negotiations, and in agreeing upon the terms of this contract, and whatever you did in connection with it, up to the time you transferred your interest in the Wyoming Coal Company, on the 23d of September, for whom, and on whose behalf you acted?

A. On behalf of myself, Thomas Wardell, W. S. Watson, and John Duff, who represented the remainder.

Q. Up to the time of making the contract whom did you represent?

A. Only Wardell, Watson, and myself. As further evidence of this, I would state that Mr. Duff was incensed at me for selling out my interest, and so stated to my friends.

(Counsel for plaintiff objects to witness stating what Duff said to somebody else.)

Mr. Poppleton. State whether or not you represented Duff prior to the signing of the contract?

A. I did not.

Q. Subsequent to the signing of the contract and up to the assignment to Wardell, how did you represent him?

A. I represented him in proportion to the moneys that had been paid in.

(Counsel for plaintiff objects on the ground that the witness is stating conclusions instead of facts.)

Mr. Poppleton. State whether or not at the time this contract was made and before any steps had been taken in execution of it either by you or Wardell individually, or in the name of the Wyoming Coal Company, Wardell knew that Duff or any other director of the Union Pacific Railroad was to have an interest in this contract, and that it was to be assigned to a corporation in which they were to become stockholders?

A. I cannot state that he did. We had previously talked of it, and both expected somebody to have an interest in it. This was before the signing of it.

Q. Both before and after it was signed, but before it was carried into execution?

A. I did not understand the question. May I answer it again? I understood the execution of the contract to be the signing it. Mr. Wardell and myself, up to the time of signing it, had little chance for conference in New York, and I acted as the party negotiating. When it had been signed, and before we left New York, I explained to Mr. Wardell the conditions on which the contract had been taken, and that Mr. Duff would represent somebody or some proportion in the Wyoming Company.

Q. That does not fully answer the question; state whether or not Mr. Wardell knew that to effectuate or carry out this plan a corporation was to be formed, in which Duff and the people he represented were to become stockholders?

A. Do you mean before he left New York?

Q. Yes.

A. He did.

Mr. Woolworth. Why don't you ask if he knew prior to the execution of the contract?

Mr. Poppleton. State when and where he acquired that knowledge?

A. Partially in the office of the company, more fully in the coupé going to the Fifth Avenue, and it was fully discussed at the Fifth Avenue.

(Counsel for plaintiff objects that this is giving the opinion

of the witness without stating facts showing how Wardell came to the knowledge of these matters.)

Mr. Poppleton. Who informed him?

A. I did.

Q. State, as near as you can recollect, what you said to him?

A. It would be impossible to give the language. I know that I told him, from the fact that in our room we both laughed over it, and he made the remark previously given to you, to wit: "Godfrey, you would not take less than a third, possibly you would be content with a fourth, but you had to take a tenth."

The further taking of testimony was then adjourned to to-morrow, Dec. 1st, at 10 o'clock A. M.

OMAHA, NEB., December 1, 1876.

The direct examination of Cyrus O. Godfrey was resumed by Mr. Poppleton, at 10 o'clock, A. M., as follows:

Q. State who took possession of the contract between yourself and Mr. Wardell, on the one hand, and the railroad company, on the other, said contract being dated the 16th day of July, 1868?

(Objected to by counsel for plaintiff on the ground it has already been testified to.)

The Witness. When signed on the directors' table, Mr. Wardell, or myself, or both, picked it up, and in the outer room, when I had another conversation, Mr. Duff took the contract and put it in the vault.

Q. State whether you have ever seen it since?

A. I never have.

Q. What reason did he give for taking it, if any?

(Objected to by plaintiff's counsel as having been stated already.)

The Witness. He spoke of being custodian of it. My recollection is, he also spoke of being land commissioner of the road.

Q. Did he use the term, "land commissioner," "chairman of the land committee?"

(Objected to by plaintiff's counsel as leading.)

The Witness. If either, as land commissioner.

Q. For what purpose was the $21,750 paid on your draft—to what use applied?

Objected to by plaintiff's counsel as matter that has already been gone over.

The Witness. It was drawn by myself and Mr. Waddell. It was credited to my individual account in the First National Bank of Hannibal. It was placed to the credit of Thomas Wardell for the use of the Wyoming Coal Company on my books, and by Mr. Clark, bookkeeper of the Wyoming, placed to the credit of the stockholders of the Wyoming.

Q. State what knowledge, if any, Wardell had of the application of this money?

A. The books were in his hands, and the entries were made under his eyes. The books continued to be in his hands up to the time of my retiring from the business?

Q. What conversation have you had with Wardell, if any, in respect to the payment of this five per cent. on capital stock by himself on this draft?

A. I cannot recollect specific conversations. I know it was discussed and understood between us. He joined me in the making of the draft.

Q. Was this prior or subsequent to your sale to Wardell?

A. Prior.

Q. What interest did you sell to Wardell?

A. I sold a one-twentieth interest in the contract which I supposed I possessed.

Q. What conversation, if any, did you have in New York at the time of making the contract, with C. S. Bushnell, with respect to the interest of parties under it?

A. Mr. Bushnell was present on the 15th and 16th among the various gentlemen in Mr. Dillon's office. I conversed with him twice in regard to the contract, or in regard to the railroad, or its stockholders, having an interest therein. I can't remember distinctly the proportions or amount spoken of.

Q. What did he say, if anything, about his own, or Duff's, or Durant's, or Dillon's, or Ames' interest in this contract?

A. I can only remember that he spoke encouragingly of it as a very profitable enterprise.

Q. My question was direct as to what he said about the interest.

A. I can only remember he said he expected to have his proportion of the stock.

Q. Stock in what?

A. In the company to be organized.

Q. Have you any knowledge of the subscription to the capital stock of the Wyoming Coal Company subsequently made by Wardell, Durant, Dillon, Ames, Duff, and others?

A. That was all done after my withdrawal from the company, as far as I know.

Q. Have you had any conversation with Wardell in respect to it; if so, what?

A. I have heard Mr. Wardell speak of the subscription to the stock. The details I cannot give.

Q. Up to the time you disposed of your interest, in what name was the business of furnishing and delivering coal to the railroad company transacted?

A. Wyoming Coal and Mining Company, and the vouchers for August, 1868, were made in that name.

Q. Who received and receipted for moneys collected for coal furnished during that time?

A. Mr. Wardell.

Q. State whether the assignment you made to Mr. Wardell was executed separately or endorsed upon the original contract, or some copy thereof, or in what form it was, and whether it is now, or has at any time since its execution, been in your possession?

A. In this connection I should add to my testimony of yesterday, the original transfer of my interest in the contract was made upon the back of a copy of the contract with the Wyoming Coal and Mining Company and given to Mr. Wardell, when some days afterwards, through counsel or otherwise, he was led to ask for another transfer to himself, which I executed in the form of a paper placed in your hands yesterday, that paper meaning not to transfer another interest, but to give the interest I disposed of to Thomas Wardell individually—the interest in the Wyoming Coal Company. The first transfer to the Wyoming Coal Company being on the back of a copy of the contract, the second transfer to Thomas Wardell being on a sheet of paper.

Q. Look at Exhibit "B," the third item thereof, [handing witness a paper,] on page 169, and explain the meaning of the words "Wyoming C. and M. Company"—what it refers to?

A. It refers to the Coal Company to be organized under the name and title of the Wyoming Coal and Mining Company, as shown in the heading of the account rendered, as shown on page 53 of Mr. Wardell's printed testimony.

Q. Look at the item of September 23d, on page 169 of Exhibit "B," attached to your testimony, namely: "W—— stock; see private letters, twelve fifty," and explain that entry?

(Objected to by plaintiff's counsel, as calling for the contents of private letters referred to in the entry.)

The Witness. That entry, under date of September 23d, referring to Wyoming stock as shown in private letters, is a charge for cash which Mr. Wardell was to pay me for the stock or interest in the Wyoming, and the sheet referred to in private letter-book is my exhibit "A," and was torn from the letter-book in your presence yesterday.

Q. Look at the item of August 21st, on page 170 of Exhibit "B," in your testimony, namely: "W—— stock, as follows," and explain the four entries following that?

A. Those entries were designed to be five per cent. against each of the individuals of the stock to be issued to them, stock in the Wyoming Coal and Mining Company, to wit: Twenty-five thousand to Thomas Wardell, twenty-five thousand to C. O. Godfrey, and fifteen thousand to W. S. Watson, being the remaining sixty-five thousand out of the five hundred thousand (500,000.)

Q. State whether or not the contract set out on pages 4, 5, 6, and 7 of the aforesaid bill of complaint in this case is the contract you negotiated in New York, and which your testimony relates to?

A. I understand it to be a literal copy.

Q. Now, if there is any portion of your testimony in relation to which you desire to make explanations, you are at liberty to do so.

A. I want to state that in the use of Mr. Duff's name I did not design to use it individually, but for himself and associates, I having understood that nine-tenths of the stock was to go to him, and that he was acting either for the R. R. Co. or the stockholders therein. In the matter of my conversations with Mr. Duff, I want to explain that I had them at two different places and four or five different times,

once in the presence of Mr. Wardell, soon after he got his introduction to Mr. Duff, and my last conversation—and one of my most important ones with Mr. Duff—was in the outer room, after we had left the directors and the contract had been signed. I may possibly have given the idea that I was authorized to use Mr. Wardell's name in signing papers. Wherever I have stated that I was by common consent the negotiating party, I meant to say that I was the president of companies in which he had been interested, and as such I was generally the one to negotiate alone. In the matter of the one-tenth interest, it is due to myself to explain that I did not fully understand, when first mentioned in the inner room, that our interest must be brought down to one-tenth—that it meant one-tenth for both of us. I was afterwards enlightened through the making of a draft that should cover nine-tenths of the stock, less fifteen thousand to W. S. Watson.

I don't know that I have anything more to explain.

Q. You speak of Duff as acting for himself and associates; state whether or not you understood Durant, Dillon, Ames, and Bushnell to be among the persons he was acting for, whether he made any statement on that subject; if so, what?

(Objected to by counsel for plaintiff, and as calling for an understanding from the witness, instead of facts from which the court may deduce an understanding.)

The Witness. He gave no names to whom stock was to be assigned. The part taken in it by Mr. Bushnell gave me the distinct understanding that he was to have a portion thereof; whether they were acting for the railroad or stockholders thereof I cannot affirm positively.

For value received, I do hereby assign and set over to Thomas Wardell all my right and interest in and to a certain contract received on joint account from the Union Pacific Railroad running west from Omaha, Neb., the consideration received being two thousand and forty-five dollars, and a return to me of five per cent. paid, being first assessment on twenty-five thousand dollars stock, said Wardell assuming all the advantages and liabilities connected therewith, and in case of need my proportion of stock can be issued to me and by me assigned to Wardell, old contract to be cancelled. This trans-

fer to Wardell being part and parcel of my transfer previously made to the Wyoming Coal and Mining Company.

C. O. GODFREY,
THOMAL WARDELL.

Exhibit "A."
HOMER STULL, *Examiner.*

THOMAS WARDELL, IN ACC'T WITH C. O. G., DR.

| | | | | |
|---|---|---|---|---|
| May | 27, 1868. | 1st Nat. Bank check, 240..... | $4,500 | 00 |
| July | 29, " | Goods bought of C. E. Kingsbury on acc't Wyoming C. & M. Co..... | 1,963 | 20 |
| " | 29, " | 1st Nat. Bank check, 291..... | 126 | |
| " | 31, " | " " " 300..... | 60 | |
| August | 1, " | Kingsbury Bros., goods for Wyoming..... | 45 | |
| " | 7, " | Bailey & Wightman, goods for Wyoming..... | 91 | 72 |
| " | 6, " | P. J. Pauley & Bro., acc't Wyoming ..... | 40 | |
| " | 14, " | Central Coal & M. Co., stamp. | 2 | 50 |
| " | 17, " | C. O. G. Travelling ex. acc't Wyoming..... | 161 | 00 |
| " | 17, " | D. K. Wood & Co., 3 cars lumber acc't Wyoming ..... | 457 | 21 |
| " | 17, " | 1st Nat. Bank check, 313..... | 15,000 | |
| " | " " | " " " " 317..... | 2,888 | 40 |
| " | 14, " | Cash. Nails and scrap-iron... | | 30 |
| " | " " | Telegram acc't Wyoming..... | 2 | 65 |
| " | 20 " | Middleton & Co., copying-press, Wyoming..... | 14 | 50 |
| " | 21 " | Central C. & M. Co. stationery, Wyoming..... | 100 | 00 |
| " | " " | C. E. Kingsbury, 3 days buying goods.....$10 00<br>R.R. fare..... 2 00<br>Expenses..... 8 00 | 20 | 00 |
| " | " " | 5 per cent. on 17,500 stock Wyoming Co..... | 875 | 00 |
| " | " " | 5 per cent. on 7,500 stock Wyoming Co..... | 375 | 00 |
| " | " " | 1st Nat. Bank check, 321..... | 4,027 | 52 |

| | | | | |
|---|---|---|---|---|
| August | 22, | 1868, | 1st Nat. Bank check, 323..... | $1,000 |
| " | 31, | " | C. O. G. for rifle..... | 25 |
| Sept. | 1, | " | " half wages for August. | 75 |
| " | 23, | " | Central C. & M. Co., note @ 90 d..... | 8,000 |
| " | " | " | Wyoming stock; see private letters ..... | 1,250 |
| " | " | " | C. O. Godfrey, half wages to 22d ..... | 55 |
| Oct. | 10, | " | 1st Nat. Bank check, 378..... | 111 |
| " | 19, | " | Central C. & M. Co. acc't *vs.* Wyoming..... | 732 92 |
| " | 23, | " | Thomas Rice, services, Wyoming..... | 30 |
| Nov. | 5, | " | 1st Nat. Bank chk., 416..... | 2,500 |
| Mch. | 16, | 1869. | Cen. C. & M. Co. acc't *vs.* T. Wardell ..... | 491 69 |
| | | | | $45,020 61 |

E. & O. E., Hannibal, Mo., May, '74.

M. B. MERRIMAN,
*B.-K.*

THOMAS WARDELL IN ACC'T WITH C. O. GODFREY, CR.

| | | | | |
|---|---|---|---|---|
| May | 21, | 1868. | Brown's draft deposited..... | $4,500 |
| July | 24, | " | Draft on T. Wardell..... | 13,000 |
| " | 30, | " | " 260 on Secty U. P. R.W. | 21,750 |
| Aug. | 21, | " | Wyoming stock as fol..... | 3,250 |
| | | | C. O. G. 5 per cent. on 17,500, $875 | |
| | | | W. S. W. 5 per cent. " 15,000, $750 | |
| | | | T. W. 5 per cent. " 17,500, $875 | |
| | | | C. O. G. 5 per cent. " 7,500, $375 | |
| | | | T. W. 5 per cent. " 7,500, $375 | |
| " | 21, | 1868. | C. E. Kingsbury dis. on Quincy bills ..... | 9 20 |
| Sept. | 24, | " | E. T. Hornblower's note discounted..... | 2,500 |
| " | 28, | " | D. K. Wood & Co. bills..... | 11 41 |
| | | | | $45,020 61 |

E. & O. E., Hannibal, Mo., May 2, '74.

M. B. MERRIMAN,
*B.-K.*

The significance of the language of Duff, that "they (Godfrey and Wardell) could afford to take a small interest because of the magnitude of the price per ton," coming from a managing member of the board of directors and executive committee of the Railroad Company, who afterwards became president of the Coal Company, to which this contract was assigned without consideration, is not difficult to measure. It leaves no doubt that the contract was a fraud from the beginning—conceived and designed and framed for the main purpose of enriching a half-dozen trustees of the stockholders of the Railroad Company at the expense of their *cestius que* trust.

Who were to have the benefit of these prices—Duff, Durant, Ames, Dillon, Bushnell, Lombard? Who paid these prices? The corporation of which these men were officers—the stockholders of whom these men were the trustees and agents.

*c.* Bushnell testifies directly to substantially the same state of facts.

Record, fol. 509, answer to fifth and sixth direct interrogatories.

*d.* Poppleton says that in November, 1868, Wardell represented the facts to him as stated by Godfrey and Bushnell, saying Durant had sent him to have the necessary articles of incorporation drawn to carry out the agreement.

Record, fol. 631.

See testimony of Government Director J. F. Wilson, Record, fol. 436.

There was a statement of the facts by Wardell himself, made soon after the contract, when no motive for misrepresentation existed, substantially in accord with testimony of of Godfrey and Bushnell. Thus the direct testimony of the validity of the contract seems conclusive.

II.

The indirect circumstantial and internal evidence afforded by the contract itself is equally conclusive.

*a.* The proof shows beyond dispute that when the contract was made, the company, through its own agents and officers, knew that inexhaustible supplies of coal existed near the line of the road, at Carbon, Rock Springs, and Evanston or Alma; that the veins were immense, near the surface, easily worked, and not over a quarter of a mile to a mile from the main track of the railroad, and that the track was built beyond Carbon when the contract was let. It was finished to Carbon June 24, 1868, about twenty days before this contract was signed, and to Evanston in December of the same year. (Rec., fol. 369.) They had derived this knowledge from the official reports of their engineers and from pioneers and plainsmen who had explored that country. At his first interview, Wardell told Duff substantially the same facts, in giving the result of his own visit to the coal fields on the line.

At the hour the contract was made, and some time before, the company were buying coal of Creighton, who was mining it with shovels and delivering it in carts without the aid of any appliances or machinery ordinarily used in such work. On the 22d day of August, 1868, following the date of the contract, Wardell made a contract with this same Creighton to furnish fifty tons per day, delivered on board the cars, until August 20, 1869, at four dollars and fifty cents per ton; Wardell's contract price was six dollars per ton. Thus, in the commencement of this enterprise, a profit was stipulated for equal to seventy-five per cent. of what Wardell had told Duff would be the entire cost of putting the coal on the cars.

Rec., fol. 325.

See also Wardell's answer to 10th int., Rec., fol. 275.

Wardell told Duff before the contract was made it would cost only two dollars per ton to mine the coal.

Wardell says, (Rec., fol. 268 :)

" *In the Summer of* 1867 I was in Omaha for the pur-
" pose of selling to the Union Pacific Railroad Company
" some of our Missouri coal. Webster Snyder, the general
" superintendent, informed me that they were getting all
" the coal they wanted from the mines on the North West-
" ern Railroad, and they expected in a short time to reach
" the coal fields on the line of their own road, which was
" at that time in process of construction."

Wardell says, (Rec., fol. 270 :)

" My recollection is that Mr. Duff asked me how much
" coal there was on the line of the road at Carbon, and its
" thickness. I stated to him that the coal was nine feet
" thick, and that the out-crop was about a quarter of a mile
" from the railroad, on the one side ; one and one-half miles
" from it on the other side, and that, in my opinion, the coal
" extended from the points described, and lay under the bed
" for the track. He asked how much it would cost to mine
" it. I replied that I believed the cost of mining the coal
" would not exceed eight cents per bushel, or two dollars
" per ton."

All this information was given Duff by Wardell before negotiations commenced in New York, which culminated in the obnoxious contract.

Again he says, (Rec., fol. 313 :)

" The mines are distant from the railroad track from fifty
" feet to half a mile, except that at Alma, which is two and
" a half miles distant. The seam at Carbon is about nine
" feet thick, and the seam at Alma is worked out at about a
" thickness of eight feet."

See also testimony of Durant, Rec., fol. 361.

In respect to the cost of mining the coal, ex-Government Director J. F. Wilson testifies, (Rec., fol. 448:)

"During the first year of the operation of the mines by "the Union Pacific Railroad Company the cost of produc- "tion of coal to the company was reduced from the high "rates specified in the aforesaid contract to $2.13¼ per ton, "and during the next year, to wit, 1875, the cost of produc- "tion was reduced to an average of $1.99¼ per ton."

The motive of such a contract can be partially fathomed by a careful reading of the letter of John Duff, president of the Coal Company, to Thomas Wardell, secretary and treasurer thereof, found on fol. 338 of the record. Though not bearing directly upon the question in hand, it is a suggestive document.

Let us analyse this contract and group its monstrous provisions.

### WHAT THE WYOMING COAL COMPANY GOT.

1. The exclusive right to prospect for and mine coal on the whole line and the entire land grant of the Union Pacific Railroad Company.

2. All information the railroad had collected through its engineers and otherwise, and free passes for the agents of the Coal Company.

3. Switches and side tracks for the business of the Coal Company.

4. A twenty-five per cent. drawback on coal delivered for general consumption for fifteen years.

5. All the cars needed by the Coal Company, and their transportation as promptly as possible.

6. A lease of all the coal lands included in the land grant of the Railroad Company for fifteen years.

7. Contract to run fifteen years.

8. An absolute guarantee by the Railroad Company to the Coal Company of ten per cent profit.

9. Prices for two years three times what Wardell told Duff, before the contract was made, would cost to mine the coal, for three years more two and a half times, for four years more twice, and for six additional years fifty per cent., more than such cost.

WHAT THE RAILROAD COMPANY GOT.

1. Wardell's knowledge and information which he had previously communicated to the Railroad Company.

2. The privilege of paying an average price of $5 per ton for coal mined and taken from their own lands for fifteen years, which its officers knew would not cost for mining over $2 per ton.

3. The promise of Godfrey and Wardell, unsupported by any bond or surety, to expend $20,000 in five years in the development of its coal lands.

The key to the motive inspiring this extraordinary contract is found in the significant language used by Duff in his response to Godfrey and Wardell in New York: "*What "difference does it make to you what your interest is, if the "prices are high enough?*"

*b.* The proof is overwhelming, notwithstanding Wardell's denial, that not only a corporation, but a corporation to be called the Wyoming Coal and Mining Company, was in contemplation at the making of the contract, and that the business of executing the contract was commenced in its name in August, 1868, and so continued, as well before as after the actual organization of the company.

Oliver Ames says, (Record, fol. 456:)

"It was so understood that a corporation should be so or-"ganized."

Bushnell says, (Record, fol. 509:)

"Yes; it was understood that the directors and stock-
" holders in the Union Pacific Railroad Company were to be
" interested to the extent of nine-tenths interest in said con-
" tract, through the stock of a coal company to be organ-
" ized. I know the Wyoming Coal Company was organ-
" ized in pursuance of that negotiation and arrangement."

Godfrey swears that it was agreed that such a company should be organized; that the amount of its capital stock was agreed upon; that an account was opened in the name of the Wyoming Coal and Mining Company immediately after the contract was made, with the knowledge of Wardell, and produces copies of such accounts. It is also certain that in September, 1868, Godfrey assigned his interest in the contract to the Coal Company. These writings and entries could have had no existence if Wardell is right in his assertion that such a corporation was never thought of until the winter of 1858–'9.

See Wardell's Testimony, Rec., fols. 278, 280, 281, 282, 299.

D. O. Clark, who was the bookkeeper of Wardell, puts the matter beyond controversy. He says the business, under the contract, was always transacted in the name of the Wyoming Coal and Mining Company, and that the books were opened under the direction of Wardell; that Godfrey and Wardell furnished the items to make the entries; that, at first, Wardell made some transactions in his own name; that he paid out money for the company and loaned money to it, for all which he rendered bills against the Wyoming Coal Company, and was paid by it. The vouchers for coal in September, October, November, and December, 1868, were made to the Wyoming Coal Company. The amount received from New York was credited in August, 1868, to stockholders of the Coal Company, leaving a blank for the

name and share of each. Wardell knew this and never objected to it. Blanks were printed in Hannibal in the name of the Wyoming Coal and Mining Company before Wardell and Clark came to Omaha, and from the outset the business was conducted in the name of the Coal Company.

See testimony of D. O. Clark, Rec., fol. 623. This testimony is that of a disinterested party, who had the means of knowledge and is very important.

Poppleton's statement of the communications of Wardell to him in November, 1868, is in harmony with all this testimony, and confirms and corroborates it.

If there was no prior agreement to organize a corporation, why did Wardell assign this immensely valuable contract to the Wyoming Coal and Mining Company without any consideration whatever, and admit Duff, Ames, Dillon, Durant, and Bushnell to the control of it? It is impossible to answer the question. This action can only be explained on the theory that Godfrey and Clark have stated the truth, and Wardell has failed to state it.

The only testimony seemingly in conflict with all this is that of Duff and Wardell, the two principal manipulators of the contract and the Coal Company. A careful analysis of the testimony of Duff will show it is not a denial of the facts charged in respect to the fraudulent character of the contract. That of Wardell is so inconsistent with itself, so in conflict with that of others, and manifestly given under such a pressure of interest and passion, as not to be entitled to credit when in conflict with others.

This court has said that contracts of this character, in form, "should be viewed with jealousy by the courts, and "may be set aside on slight grounds." It is respectfully submitted that the "grounds" produced for nullifying this contract are not "slight," but overwhelming. That it has

been shown to be odiously void, and that it can afford no footing for the relief sought.

The execution of the contract by the company prior to March 12, 1874, was not a ratification thereof. It seems absurd to say that a board of directors, composed of and controlled by the parties participating in a fraudulent contract, have ratified it by accepting and acting upon it. Such a contract can only be ratified by the stockholders with full knowledge and explanation of its character.

Railroad Co. *vs.* Dewy, 14 Mich., 488.
Paine *vs.* S. E. & L. S. R.R. Co., 31 Ind., 283.
33 Barb., 578. 45 Barb., 356.

This contract is not only a fraud on the stockholders, but is void as against public policy.

18 Pick., 472; 45 Mo., 212; 60 Ill., 138; 60 Ill., 308; 22 Cal., 342.

Such a contract is not susceptible of ratification.

The covenant in the contract for drawback of twenty-five per cent. on coal for general consumption amounts to a contract to discriminate against the general producer of coal, and as such is void.

Stewart *vs.* Lehigh Valley R.R. Co., 38 N. J. L. 505.

The president, without express authority, can only make contracts in respect to the current business of the corporation.

Blew *vs.* Mining Co., 20 Cal., 602.

It is therefore submitted that the proof shows that the contract was a fraud on the stockholders of the Railroad Company, and against public policy; that Wardell knew it, participated in it, executed it in part, and received its fruits, and that he is not entitled to relief in this action.

18 Pick., 472; 22 Cal., 336; 43 N. Y., 273; 69 Mo., 277; 15 Kan., 157; 1 Story's Eq., § 298; 13 Mass., 250; 11 Wheat., 258.

SECOND.

That in case the court is of opinion that the contract was valid, the interest of Wardell is that of a shareholder of the Wyoming Coal and Mining Company, and one-tenth of the capital stock, seems to me, too plain for argument.

In that character he has not made a case which entitles him to bring this action.

He has failed to show any refusal of the Wyoming Coal and Mining Company to assert his rights by bringing suit. Such a demand and refusal is essential to the maintenance of this action.

La Grange *vs.* State Treasurer, 24 Mich., 468.
Neely *vs.* Oregon Central, 1 Sawyer, 63.
Hatch *vs.* E. R.R. Co., 8 Blatch., 347.
Dodge *vs.* Wolsey, 18 How., 331.
Memphis *vs.* Dean, 8 Wall., 64.
Browson *vs.* La Crosse, 2 Wall., 283.

He has failed to show any conspiracy to exclude him from his interest in the company, or to make a case entitling him to resort to a court of equity.

Samuel *vs.* Holliday, 1 Woolworth, 400.

THIRD.

The settlement and satisfaction of September 30, 1875, is valid and binding.

In fact, it is not impeached, being simply denied. The proof is conclusive, and the settlement must stand unless set

aside on specific allegation of fraud, collusion, or other illegality which will avoid it.

Proceedings of a board of directors of a corporation, out of the jurisdiction of its creation and organization, will be upheld.

Ames *vs.* Conant, 36 Vt., 745.
Miller *vs.* Ewer, 27 Me., 517.
Copp *vs.* Lamb, 12 Me., 312.
Wright *vs.* Benny, 11 Ind., 404.
O. & M. R.R. Co. *vs.* McPherson, 35 Mo., 13.
Galveston R.R. Co. *vs.* Coudry, 11 Wall., 476.

Notice of a meeting of the directors of a corporation is waived by the presence and consent of all who have a right to be present.

Angell & Ames on Cor., p. 495.
Stebbins *vs.* Merritt, 10 Cush., 27.
People *vs.* Peck, 11 Wend., 604.
People's Ins. Co. *vs.* Wescott, 14 Gray, 440.
Bryant *vs.* Goodnow, 5 Pick., 228.
Jones *vs.* Miller Town Co., 7 Ind., 547.

When records show a meeting with quorum present, notice is presumed.

Sargeant *vs.* Webster, 13 Met., 497.
Lane *vs.* Brainard, 30 Conn., 565.
Middlesex *vs.* Davis, 3 Met., 133.

Business which may be transacted at a meeting of the board of directors of a corporation, duly called by a proper notice, may also be transacted at adjournments of the same meeting.

Smith *vs.* Law, 21 N. Y., 296.
People *vs.* Bachelor, 22 N. Y., 128.
Farrer *vs.* Perley, 7 Me., 404.

Schoof *vs.* Bloomfield, 8 Vt., 472.
Warner *vs.* Mower, 11 Vt., 285.

Validity of acts of the board of directors of a corporation cannot be questioned collaterally on ground of want or irregularity of notice.

Chamberlain *vs.* Painesville R.R., 15 Ohio St., 225.
Edgerly *vs.* Emerson, 3 Foster, 555.
Despatch Line *vs.* Bell Man'g Co., 12 N. H., 205.

A quorum being once duly present, the acts of such a meeting shall be held valid.

Buell *vs.* Buckingham, 16 Iowa, 291.
Cahill *vs.* Kal. Ins. Co., 2 Doug., 124.
Sargeant *vs.* Webster, 13 Met., 497.
Angell & Ames on Cor., 501.

*De facto* directors' action will be upheld.
39 Me., 587.

The articles of association do not require the secretary and treasurer to be a director of the corporation.

Wardell is estopped from objecting to the proceedings of the meetings of December 13 and 16, 1872, by acquiescence and delay.

FOURTH.

Assuming the contract to be valid and the stock of the W. C. & M. Co. to be acquired as shown in proof, the Union Pacific Railroad Company has the corporate capacity to take and hold the stock of the Coal Company not subscribed and owned by Wardell.

Stewart *vs.* First Nat. Bank, 2 Abbott, (U. S.,) 424.
Mason *vs.* Crossley, 3 Woodbury & Minot, 258.
Parish *vs.* Wheeler, 22 N. Y., 503.

White *vs.* Franklin Bank, 22 Pick., 181.
Tracy *vs.* Talmage, 14 N. Y., 162.
Delgroff *vs.* Am. Linen Thread Co., 21 N. Y., 124.
Bissell *vs.* M. S. & N. I. R.R. Co., 22 N. Y., 258.
Firth *vs.* La Rue, 15 Barb., 322.
Gould *vs.* Town of Oneota, 3 Hun., 401.
Southern Life Ins. Co. *vs.* Lanier, 5 Fla., 110.
Hazlehurst *vs.* Savannah R.R. Co., 43 Ga., 13.

Upon the foregoing considerations it is respectfully submitted that the decision of the court below setting aside the contract should be affirmed.

A. J. POPPLETON,
*Counsel for Defendant,*
*The Union Pacific Railroad Company.*